IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1426

STATE OF ALABAMA,

Petitioner

VERSUS

THOMAS R. PRINCE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICES

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STATE OF ALABAMA,

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VS.

THOMAS R. PRINCE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, the State of Alabama, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 31, 1975, rehearing having been denied on March 13, 1975.

PRIOR OPINIONS

The Report and Recommendation of the Magistrate and order of the United States District Court for the Northern Division of Alabama denying the writ of habeas corpus on July 31, 1973, are not reported and are submitted as Appendix "A" to this petition.

The decision and opinion of the United States Court of Appeals for the Fifth Circuit reversing the District Court is reported as: *Prince v. Alabama*, (5th Cir., 1975) 507 F. 2d 693. The same is submitted as Appendix "B" to this petition.

The following decisions and opinions in other cases involving these same parties are relevant to this case and are submitted as appendices to this petition for the information and convenience of this Honorable Court:

Prince v. Bailey, (N.D. Ala., C.A. 71-1003) issued January 12, 1972, which is not reported but is submitted as Appendix "C" to this petition.

Prince v. State, 50 Ala. App. 368, 279 So. 2d 539 (1973), which is submitted as Appendix "D" to this petition.

JURISDICTION

The decision, opinion and judgment of the United States Court of Appeals for the Fifth Circuit was issued on January 31, 1975. A timely application for rehearing was denied by the said Court of Appeals on March 13, 1975, and this petition is filed within ninety (90) days of said date.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I

ON THE SPEEDY TRIAL ISSUE

This Honorable Court has held that where a party who

is indicted by a state is imprisoned in another jurisdiction but is available for trial on the indictment, the State of the indictment owes such party affirmative, diligent and good faith efforts to speedily try him. Given this rule, this case presents these questions:

A. Do quick, affirmative, diligent and good faith efforts on the part of the indicting State to determine the availability of the prisoner-indictee for trial and immediate extradition of the prisoner-indictee upon learning that he is available for trial constitute compliance with the indicting state's duty to speedily try such prisoner-indictee?

B. What effect does the unwillingness of the imprisoning jurisdiction to make the prisoner-indictee available to the indicting state for trial have on the duty of the indicting state to speedily try the prisoner-indictee?

C. What effect do the acts and omissions of the prisoner-indictee in causing and continuing the delay of his trial have on his right to a speedy trial?

II

ON THE ISSUE OF THE REJECTION OF THE STATE COURT FINDING OF FACT

Where, in an action by a state prisoner for a writ of habeas corpus under 28 U.S.C. 2254, there is proven a finding of fact made by a State Court under the conditions set out in 28 U.S.C. 2254 (d) and such finding of fact is based on a reasonable interpretation of the evidence and is adopted by the Federal District Court, may a Federal Court of Appeals substitute its interpretation of the evidence for that of the State Court and reject the State Court's finding?

CONSTITUTIONAL PROVISIONS INVOLVED

A.

The Sixth Amendment to the Constitution of the United States, in particular the speedy trial clause, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state . . ."

B.

The Fourteenth Amendment to the Constitution of the United States, Section One, which read as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

28 United States Code, Section 2254, Subsections "a," "d" and "f," which are submitted as Appendix "E" to this petition.

STATEMENT OF THE CASE

On June 21, 1973, the Respondent filed a petition for a

writ of habeas corpus under 28 U.S.C. 2254 Alleging that he was being held by the State of Alabama in violation of his U.S. Constitutional right to a speedy trial. The Respondent sought leave to proceed in forma pauperis. (R. pp. 3-9)

On July 10, 1973, the United States District Court for the Northern District of Alabama granted the Respondent leave to proceed in forma pauperis and issued an order to the State of Alabama to show cause why the writ should not be granted. The show cause order specifically stated:

> "The State of Alabama has heretofore filed a response in C.A. 71-1003. The State of Alabama may, if it wishes to do so, rely upon the materials submitted in response to the show cause order in C.A. 71-1003." (R. p. 10)

"C.A. 71-1003" was a previous Federal Habeas Corpus case filed by the Respondent against the sheriff of Jefferson County, Alabama, in which the State of Alabama was the real party in interest. The style of said previous case was: "*Prince v. Bailey*, (N. D. Ala., 71-1003") See Appendix "C." In *Prince v. Bailey* the State had submitted the entire transcript of the State Court hearing on the respondent's motion to dismiss the indictments on the ground that he had allegedly been denied a speedy trial. This transcript was submitted as three separate exhibits in *Prince v. Bailey:* The transcript of the testimony at the State Court hearing as Exhibit "A", the collected State's Exhibits entered at the State Court hearing as Exhibit "B" and the collected Defense Exhibits entered at the State Court hearing as Exhibit "C."[1]

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[1] In **Prince v. Bailey** the writ was denied see appendix "C." On appeal the Fifth Circuit reversed and remanded the case and directed dismissal of the cause without prejudice. See **Prince v. Bailey**, (5th Cir., 1972) 468 F. 2d 544.

The State responded to the show cause order by re-submitting the materials it had previously submitted in *Prince v. Bailey*, C.A. 71-1003, supra, and by submitting the decision and opinion of the Court of Criminal Appeals of Alabama in the Respondent's State Court appeal, i.e. *Prince v. State*, 50 Ala. App. 368, 279 So. 2d 539 (1973), Appendix "D." (R. pp. 11-22) In said case, the Alabama Court of Criminal Appeals had made the following findings of fact:

A. The Respondent had been indicted on May 10, 1962 and December 5, 1963.

B. Prior to these indictments the Respondent had left Alabama and gone to California where he was arrested, indicted, tried, convicted and sentenced for various crimes.

C. The Respondent was convicted in California on November 27, 1962, and remained in the California prison system until February 22, 1971.

D. Beginning on July 12, 1962, and continuously until February 1, 1971, the State of Alabama had corresponded with the State of California concerning the Respondent. This correspondence consistantly indicated Alabama's desire to extradite the Respondent to Alabama for trial at Alabama's expense as soon as possible, in addition this correspondence inquired as to the Respondent's availability for extradition. There were thirteen (13) different pieces of correspondence of this nature from Alabama to California.

E. Beginning in 1964 the Respondent had appeared before the California Parole Board and had been offered parole to Alabama for trial on the Alabama charges but the Respondent had refused to accept the condition of such parole, i.e. waiver of extradition to Alabama, until 1971.

F. Prior to July 9, 1968, the Respondent had contacted various Alabama officials asking that the Alabama charges be dropped but had not requested trial on the charges until that date.

G. The State of California had never indicated that the Respondent was available for extradition to Alabama until February 22, 1971.

H. As soon as California had indicated that the Respondent was available for extradition, Alabama had extradicted the Respondent and placed his cases on the docket for trial.

I. Seven months later, during which period both the Respondent and the State requested and were granted continuances, the first of the Respondent's cases was tried.

J. The State of Alabama had secured the Respondent's presence for trial as soon as possible and could not have tried him prior to February of 1971.

K. The Respondent's defense was alibi and he presented several witnesses to support his alleged alibi.

None of these findings of fact, except "E" (that the Respondent had refused parole to Alabama conditioned on his waiving extradition), have been heretofore questioned by the Federal Courts. There appears, therefore, to be no reason for detailing the evidence supporting these findings, except "E."

The evidence received at the State Court hearing was submitted in *Prince v. Bailey* and re-submitted in this case

and that evidence supporting find "E" is as follows:[2] A statement which was written and sent in 1963 by Respondent to the District Attorney of Jefferson County, Alabama, seeking dismissal of one of the charges against him. The conclusion of this statement indicates that the Respondent fled Alabama to avoid prosecution. (Exhibit B, State's Exhibit 46. See Appendix "F, I") There was a letter written by the Respondent to one of his California Attorneys on November 22, 1967. In this letter the Respondent states that he had, ". . . never signed any papers as to my agreeing upon going back to Alabama . . .", in addition, the Respondent stated that the only time the question of extradition had ever come up was at his parole hearing and, "At that time I made the statement that I would die before I be sent back to Alabama." (Exhibit "C", Defendant's Exhibit 12. See Appendix "F, II") There was a document entitled "Summary of Sentence Data" from the California Adult Authority showing the following relevant facts: First, that California was aware of Alabama's desire to try the Respondent, i.e. that Alabama had a detainer against the Respondent and, second, that the Respondent had been denied parole in 1964, 1965, 1966, 1967, 1968, and 1969. (Exhibit "C", Defendant's Exhibit 48. See Appendix "F, III") Finally, there was the Respondent's testimony concerning the fact that the Respondent had waived parole in 1970 and later withdrawn the waiver. The Respondent testified in effect that anyone who had a detainer against him had to waive extradition as a condition to parole. In addition, the Respondent testified that he had withdrawn the waiver because he would not accept a parole "go to hold," because under such a parole

[2] For the sake of brevity and clarity the **Prince v. Bailey** exhibits were referred to simply by their letter designation ("A," "B" or "C") and the particular reference will be made to the particlar State Court exhibit (designated by its State Court designation).

he would be released to Alabama for trial, after which, "I go back into the bloody walls of San Quentin [Prison, California]." (Exhibit A. See Appendix "F, IV")

The Alabama Court of Criminal Appeals had concluded: First, that the Respondent ". . . could not both demand a trial on the one hand and refuse to appear on the other." (Note 4, 50 Ala. App. 368, 370, Appendix "D") And, second, that the State of Alabama had not denied the Respondent a speedy trial, because it had gained custody of him and tried him as soon as it could have done so. (50 Ala. App. 368, 373-375, Appendix "D")

On August 2, 1973, the District Court rejected the magistrate's recommendation and concurred in the findings of fact and conclusions of law of the Court of Criminal Appeals of Alabama and denied the writ. (R. p. 23, Appendix "A")

The Respondent sought and was granted a certificate of probable cause to appeal and leave to appeal in forma pauperis. (R. pp. 31-33)

On January 31, 1975, the United States Court of Appeals for the Fifth Circuit reversed the District Court's Judgment. The Fifth Circuit rejected the State Court finding, concurred in by the District Court, that the Respondent had refused to accept a parole conditioned on his waiving extradition to Alabama for trial. The Fifth Circuit held that such finding was not fairly supported by the record. The Court of Appeals did find that the respondent had refused to waive extradition in December of 1970 until ". . . the matter of his return to California was resolved to his satisfaction." (Mn. Op. p. 3171) In addition, the Court of Appeals ruled that the Respondent's 1967 letter, in which he mentioned telling the California Parole Board that he would die before

being sent back to Alabama for trial (Appendix "F, II"), ". . . could simply be a statement of his [the Respondent's] determination to assert his legal right not to be returned to Alabama for trial . . ." (Mn. Op. p. 3172) Further, the Court concluded that Alabama's many inquires concerning the availability of the Respondent for extradition and trial were not sufficient to constitute affirmative, diligent and good faith efforts to secure the Respondent for trial and that such efforts required attempts at extradition or the issuance of writs *habeas corpus ad prosequendum.* (Mn. Op. pp. 3169-3170) Finally, the Court of Appeals concluded that it was not necessary for the Court to speculate on the possible success of such efforts. (Mn. Op. p. 3172) The Fifth Circuit ordered the writ issued and the Respondent discharged. *Prince v. Alabama,* (5th Cir., 1975) 507 F. 2d 693, Appendix "B')

Rehearing was sought by the State of Alabama but denied on March 13, 1975.[3] (Appendix "B")

SUMMARY OF THE ARGUMENT

The Fifth Circuit held that Alabama's many inquiries concerning the availability of the Respondent for extradition, were not sufficient to comprise affirmative, diligent, good faith efforts to secure his presence for trial and that such efforts required Alabama to confront California over its prisoner by demanding custody of him. Since Alabama's inquiries were in keeping with the spirit of comity, while confrontation would not have been, the Fifth Circuit's decision is in conflict with this Honorable Court's decision in *Ponzi v. Fessenden,* (258 U.S. 254, 66 L. Ed. 607, 42 S. Ct. 309, 22

[3] Subsequently, the Respondent was ordered released on bail by the Court of Appeals. The Respondent is at the present time free on an unsecured bond.

ALR. 879 [1922]). In addition, the Fifth Circuit's decision by necessary implication holds that it was acceptable for the Respondent to use his status as a California prisoner to utterly thwart the prosecution of the Alabama charges. In so holding, the Fifth Circuit's decision conflicts with this Honorable Court's holding, also in *Ponzi v. Fessenden,* supra, that such ought not be allowed.

In *Smith v. Hooey,* (393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 [1969] and *Dickey v. Florida,* (398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 [1970]) this Honorable Court held that an indictee had the right to a speedy trial even though he was imprisoned in another jurisdiction. However, in both of these cases the availability of the prisoner-indictee for trial was an essential factor. In the instant case, the Fifth Circuit did not take issue with the State Court finding, concurred in by the Federal District Court, that the Respondent was not available for trial, yet the Fifth Circuit found a denial of speedy trial. This holding conflicts with both *Smith v. Hooey,* supra, and *Dickey v. Florida,* supra.

This case involves factors which were not present in this Honorable Court's prior decisions in this area of the law, i.e. *Smith v. Hooey,* supra, and *Dickey v. Florida,* supra. These factors include: The Respondent's status as a state prisoner who was not available for trial, rather than a federal Prisoner who was available for trial, the fact that the Respondent left Alabama on his own and committed crimes in California, rather than being taken from the jurisdiction as was the case in *Smith* and *Dickey,* and the fact that the Respondent at least to some degree obstructed his return to Alabama. Because of these factors, this case presents questions not previously addressed by this Honorable Court. The questions ought to be addressed, especially in light of the "sudden

death" situation which attends violations of the right to a speedy trial. *Dickey v. Florida*, supra, and *Strunk v. United States*, (412 U. S. 434, 37 L. Ed. 2d 56, 93 S. Ct. 2260 [1973])

Finally, the Fifth Circuit rejected the State court finding that the Respondent had affirmatively obstructed his trial in Alabama. The reason for this cited by the court was that such finding was allegedly not fairly supported by the record; however, the Fifth Circuit found that the record could support a nearly identical finding. This case presents this question: In light of 28 U.S.C. 2254(d) (Appendix "E") may a Federal court in a habeas corpus action on behalf of a State prisoner reject a State Court finding of fact, which is based on a reasonable interpretation of the evidence, in favor of its own finding based on its own intepretation of the evidence? This question has never been addressed by this Honorable Court but ought to be.

ARGUMENT

I

THE SPEEDY TRIAL QUESTIONS

This case concerns the right of a state indictee to a speedy trial. See *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S. Ct. 988 (1967). Specifically, it concerns the right to a speedy trial of an Alabama indictee who fled from Alabama to avoid prosecution and went to California where he committed crimes for which he was ultimately sentenced to a California prison. This Honorable Court has held that in such a situation the State owes the indictee good faith and diligent efforts to secure his presence for trial. See *Smith v. Hooey*, 393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575

(1969).[1] Throughout this litigation the State of Alabama has argued that diligent and good faith efforts to determine if and when the prisoner-indictee would be available for extradition to and trial in Alabama were sufficient to discharge this duty when coupled with immediate extradition upon first receiving an indication that California was willing to extradict the prisoner-indictee. The State courts and Federal District Court accepted this argument, but the Fifth Circuit rejected it, holding that such efforts did not discharge this duty and that *Smith v. Hooey*, supra, required attempts at extradition or the issuance writs of *habeas corpus ad prosequendum* even in the face of communications from California indicating that these would be rejected. The Fifth Circuit did not reject, and therefore must have accepted, the findings of the prior courts that the Respondent was not available for trial in Alabama prior to February of 1971, and the Court held that the record could indicate an intention in the Respondent to resist trial in Alabama.

In so holding the Fifth Circuit ruled contrary to three prior decisions of this Honorable Court and raised several questions which have not been, but ought to be ruled on by this Honorable Court.

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[1] Although **Smith v. Hooey,** like **Ponzi v. Fessenden,** (258 U.S. 254), infra, and **Dickey v. Florida,** (398 U.S. 30), infra, concerned a federal prisoner who was under a State indictment, it has been universally held that the principles of these cases apply to State prisoners who are under indictments in other states. This is one of the bases of the Fifth Circuit decision. See **May v. Georiga,** (5th Cir., 1969) 409 F 2d 203.

REASONS FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS DECISION
CONFLICTS WITH PRIOR DECISIONS
OF THE SUPREME COURT

1.

CONFLICT WITH PONZI V. FESSENDEN

The right of a State to try an indictee who is currently imprisoned in another jurisdiction was first addressed by this Honorable Court in the Case of *Ponzi v. Fessenden*, (258 U.S. 254, 66 L.Ed. 607, 42 S. Ct. 309, 22 A.L.R. 879 [1922])[5] *Ponzi* concerned the right of a state to try a Federal prisoner with the consent of the United States. This Honorable Court held that such a right exists. The decision of the Fifth Circuit in this case conflicts with *Ponzi* on two points.

First, *Ponzi* held that the right of a State to try another jurisdiction's prisoner is one of comity and that the question of whether or not the jurisdiction under which the prisoner is serving will ". . . waive its strict right to custody of . . ." the prisoner ". . . addresses itself solely to the discretion of the sovereignty making it [i.e. the waiver], and of its representatives with power to grant it." *Ponzi v. Fessenden*, 66 L. Ed. 607, 611 If Alabama's right to try the Respondent was a matter of comity, then Alabama properly endeavored to discover how the California officials would exercise their discretion before making a formal demand for the custody of the Respondent. Alabama's many informal inquiries and California's polite refusals were in keeping with the spirit of comity. The Fifth Circuit held that these were not sufficient; that Alabama should have confronted California with demands for extradition and writs of *Habeas corpus ad*

[5] Ibid, note 4 page 13

prosequendum. The Fifth Circuit's prior cases indicate that even if these had been done unsuccessfully it still would not have been sufficient, since, according to the Fifth Circuit, the Federal courts would have been open to test the validity of California's refusal under these circumstances. See *May v. Georgia*, (5th Cir., 1969) 409 F. 203, especially note 5, page 205. Comity is by its nature based on mutual respect and good will. It is a matter of policy, not of right. See 7A Words and Phrases, "Comity," p. 381 ff. Comity is a basis for cooperation not confrontation and it is certainly not the basis of a law suit. In holding that Alabama's informal inquiries were insufficient and that Alabama should have confronted California with demands for custody of the Respondent, the Fifth Circuit ruled contrary to this Honorable Court's comity doctrine in *Ponzi v. Fessenden*, (258 U.S. 254, 66 L.Ed. 607, 42 S. Ct. 309, 22 A.L.R. 879 [1922]).

There is a second point on which the Fifth Circuit's decision conflicts with *Ponzi v. Fessenden, supra*. The Fifth Circuit apparently found that the Respondent had exercised his ". . . legal right not to be returned to Alabama for trial." Mn. Op. p. 3172, Appendix "B." Obviously, the Fifth Circuit saw nothing wrong with the Respondent resisting trial in Alabama and certainly the court did not consider this as effecting in any way the Respondent's right to a speedy trial. In *Ponzi v. Fessenden*, (358 U.S. 254, 66 L.Ed. 607, 42 S. Ct. 309, 22 A.L.R. 879 [1922]) this Honorable Court held that a prisoner who is indicted in another jurisdiction ". . . should not be permitted to use the machinery of one sovereignty to obstruct his trial in the other . . .". (66 L. Ed. 607, 611) The Fifth Circuit's decision would allow an indictee to use his status as a prisoner in another jurisdiction to utterly thwart the prosecution of his indictments, this obviously flies in the face of this decision and policy of this Honorable Court.

2.

CONFLICT WITH SMITH V. HOOEY AND DICKEY V. FLORIDA

This Honorable Court in Smith v. Hooey, (393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 [1969])[6] held that a federal prisoner who was indicted by a state and who was available to the state for trial had the right to a speedy trial. However, before reaching this decision this Honorable Court went to extraordinary lengths to be sure that the prisoner was in fact available to the state for trial. The availability of the prisoner for trial was, therefore, essential to the decision in *Smith v. Hooey*. It had to be so, if it were not then *Smith v. Hooey* overruled or superceded at least one of two basic prior holdings of this Honorable Court. These were either: *Ableman v. Booth*, (21 How. 506, 62 U.S. 506, 16 L. Ed. 169 [1859]), wherein this Honorable Court held that a state may not interfere with federal custody of a federal prisoner, or *Minder v. Georgia*, (183 U.S. 559, 46 L. Ed. 328, 22 S. Ct. 224 [1901], wherein this Honorable Court held that due process did not require the states to do the impossible. In *Dickey v Florida*, (398 US. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 [1970])[7] this Honorable Court addressed the same issues it had addressed in *Smith v. Hooey*, supra, and reached the same conclusion, but as the court noted in so holding, ". . . the record in this case shows that the Petitioner was available to the state at all times during the seven-year period before his trial . . ." 26 L. Ed. 2d 26, 31. Obviously, the availability of the prisoner for trial was essential to the holdings of this Honorable Court in both these cases.

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[6] Ibid, note 4, page 13

[7] Ibid, note 4 page 13

In the instant case the state courts found that the Respondent was unavailable to the State for trial prior to February of 1971. The District Court concurred in this finding. The Fifth Circuit did not reject this finding nor make a contrary finding and could not have done so on the record. Therefore, the Fifth Circuit's decision conflicts directly with *Smith v. Hooey*, (393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 [1969]) and *Dickey v. Florida*, (398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 [1970]).

B.

THIS CASE PRESENTS IMPORTANT QUESTIONS WHICH HAVE NOT BEEN BUT OUGHT TO BE RULED ON BY THIS HONORABLE COURT

This Honorable Court has thrice considered the question of the rights and duties of a state who's indictee is imprisoned in another jurisdiction: *Ponzi v. Fessenden*, 258 U.S. 254, 66 L. Ed. 607, 42 S. Ct. 309, 22 A.L.R. 879 (1922); *Smith v. Hooey*, 393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 (1969); and *Dickey v. Florida*, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970). Each of these cases involved a federal prisoner who was under a state indictment. The principles of these cases have been universally held to apply to state prisoners who are indicted in other states. See, for example, *May v. Georgia*, (5th Cir., 1969) 409 F. 2d 203. As a general rule this is reasonable, but the blind application of the rule ignores several important differences between the situation of a State Government and that of the Federal Government. The Federal Government can move its prisoners from state to state at will, while a State Government may do this only with the

prisoner's consent or formal extradition.* See *Roberts v. Reilly*, 116 U.S. 80, 29 L.Ed. 544, 6 S. Ct. 291 (1885), outlining the due process requirements for extradition. Federal officials carry their authority to guard and protect federal prisoners and to re-arrest them in the event of an escape wherever they go in the nation. State officials leave their arrest power and other authority at the state line. For this reason, federal prisoners who come into a state for trial do so in the custody of federal marshalls, while state prisoners are usually turned over to the authorities of the state of the trial. Thus, a state may be considerably less willing to release a prisoner to another state than the Federal Government, which need not release the prisoner at all. What is the effect of this unwillingness on the part of the imprisoning state to release its prisoner to the indicting state on the prisoner-indictee's right to a speedy trial? This case certainly presents this question.

Another question presented by this case relates to the acts of the accused in occasioning and continuing the delay. In *Smith v. Hooey*, supra, and *Dickey v. Florida*, supra, the prisoners were removed from the state by the Federal Government, presumably against their will, and certainly their wishes in the matter were given little or no consideration. In the instant case the Respondent fled Alabama to avoid prosecution and subsequently committed crimes in California which resulted in his imprisonment there. Thus, the Respondent, by his affirmative and unlawful acts, occasioned the delay which now results in his release and discharge. And, having occasioned the delay, he did nothing to make himself available to Alabama for trial. He demanded dismissal of the

*It is significant that neither **Ponzi v. Fessenden**, supra, nor **Smith v. Hooey**, **supra**, nor **Dickey v. Florida**, supra, discussed extradition. Since these cases involved Federal prisoners, neither extradition nor any issue related to it was relevant.

charges (prior to July of 1968) or a speedy trial (subsequently to July of 1968), but he never waived nor offered to waive extradition. The Fifth Circuit rejected the State court findings, concurred in by the Federal District Court, that the Respondent had affirmatively obstructed his speedy trial in Alabama, but the Court of Appeals did find that as late as December of 1970 the Respondent had affirmatively refused to waive extradition to Alabama. Mn. Op. p. 3171, Appendix "B" The Court found that the record did indicate that the Respondent, while in California, was determined to ". . . assert his legal right not to be returned to Alabama for trial . . ." Mn. Op. p. 3172, Appendix "B"

What is the relevance of a prisoner-indictee's actions in occasioning the delay of his trial? Do his failure and refusal to waive extradition have any effect on his right to a speedy trial? The Fifth Circuit held that they had no effect. In the Fifth Circuit's view, once the Respondent demanded a speedy trial, nothing else he did or did not do mattered at all. Once the Respondent demanded a speedy trial, according to the Fifth Circuit, Alabama was under an affirmative obligation to confront California over its prisoner and to resist the contrary efforts of the Respondent in order to try him and the failure to do this resulted in a denial of a speedy trial.

The State of Alabama respectfully submits that this is unreasonable and extremely poor policy. The state submits that sound policy would require that an indictee who has placed himself outside the jurisdiction of the indicting state be required to do whatever he can to make himself available for trial. At a minimum this would require his waiving extradition and, if the indictee is a prisoner of another jurisdiction, informing the indicting state that he is available for

trial, if he is or thinks he is. The State further submits that any activity on the part of the prisoner-indictee which impedes his appearance to answer the indictment ought to be considered a waiver of the prisoner-indictee's right to a speedy trial as to any delay occasioned by the impeding activity.

These questions have never been addressed by this Honorable Court. Extradition was an issue in none of the prior cases of this Honorable Court in this area. In each of these prior cases the availability of the prisoner-indictee was a given factor in the case. And, in neither of the speedy trial cases (*Smith* and *Dickey*), had the prisoner-indictee occasioned nor contributed to the delay. In the instant case extradition is an essential issue, the unavailability of the Respondent for trial has been found by each of the prior courts, except the Fifth Circuit which did not rule on the point, and the prisoner-indictee himself first occasioned the delay by affirmative and unlawful acts and then impeded his removal to and trial in Alabama.

These questions ought to be addressed by this Honorable Court. In this day of high crime and high mobility the problem of the felon who travels from state to state committing crimes is a serious and growing one. The rights and duties of the state which finally apprehends the felon, the other states that want him for trial and the felon himself are in serious need of clarification. In dealing with most constitutional rights of accused persons the states are faced with the possibility of a new trial if they should misapprehend the law and violate these rights in some regard. But, in the speedy trial area the sanction is not a new trial but final dismissal of the charges! See *Dickey v. Florida*, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970), and *Strunk v. United States*, 412 U.S. 434, 37 L. Ed. 2d 56, 93 S. Ct. 2260 (1973) In this

"sudden death" situation the states must know what the Constitution requires them to do with regard to giving prisoner-indictees speedy trials.

The instant case clearly demonstrates this need. There was no deliberate delay by the State of Alabama. On the contrary, beginning in 1962, shortly after the Respondent's arrest in California, Alabama endeavored to obtain custody of the Respondent for trial and these efforts continued until they bore fruit. These efforts began five (5) years before this Honorable Court's decision holding that a state owed its indictees speedy trials under the United States Constitution. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967) They began seven (7) years before this Honorable Court found that this right to a speedy trial extended to indictees who were imprisoned in other jurisdictions. *Smith v. Hooey*, 393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 (1969) If Alabama failed to give the Respondent a speedy trial it was not through malice nor negligence. If the State was guilty of anything it was that state officials misapprehended the law, a misapprehension in which they were joined by the State Trial Court, State Appellate Court and Federal District Court.

The questions raised by this case and presented by this petition are of obvious importance to all of the states and to prisoner-indictees. Some day this Honorable Court will want to address these problems and resolve these questions. The State of Alabama repectfully submits that now its the time and this is the case.

II

THE REJECTION OF THE STATE COURT FINDING THAT THE RESPONDENT HAD OBSTRUCTED HIS SPEEDY TRIAL IN ALABAMA

28 U.S.C. 2254(d) (Appendix "E") provides that findings of fact by state courts made under certain conditions, all of which were present in this case, are presumed correct in a Federal Habeas Corpus action by a State prisoner. In *LaVallee v. Delle Rose,* (410 U.S. 690, 35 L. Ed. 2d 637, 93 S. Ct. 1203 [1973]) this Honorable Court held that such findings were presumed correct and presumed to be based on a proper constitutional standard. In the instant case the Fifth Circuit rejected a state court finding that the Respondent had affirmatively obstructed his right to a speedy trial by refusing to waive extradition to Alabama and accept parole to Alabama for trial. The Fifth Circuit rejected this finding on the ground that it was not "fairly supported by the record." Even a cursory reading of the Fifth Circuit's opinion shows that what the Fifth Circuit rejected was the State Court's interpretation of the evidence.

The Alabama Court of Criminal Appeals found that prior to February of 1971 the Respondent had never waived extradition. *Prince v. State,* 50 Ala. App. 368, 279 So. 2d 539 (1973) (Appendix D) The Fifth Circuit did not dispute this fact. However, the State Court had gone father and found that the Respondent had not only failed to waive extradition but had affirmatively refused to do so. The State Court found that California had offered the Respondent parole to Alabama for trial on condition that he waive extradition to Alabama and that the Respondent had refused. The upshot of the State Court's position on this matter is found in footnote 4 of Judge Tyson's opinion:

"4. Apparently, due to appellant's [the Respondent's] refusal of extradition, California elected to require appellant to complete his sentence before releasing him to Alabama. *Clearly, the appellant could not both demand trial in Alabama on the one hand, and refuse to appear on the other . . .*" 50 Ala. App. 368, 370 (Appendix 4). *(Emphasis supplied)*

The Fifth Circuit independently examined the record. The Court's opinion separately discusses two parts of the evidence on this issue which was before the State Court. The paragraph of the opinion which begins at the bottom of page 3170 and ends at the top of page 3171 (Appendix "B") is obviously based on the Respondent's "bloody walls" testimony. See Appendix "F, IV". In addition, the Fifth Circuit discussed the Respondent's 1967 letter to his California attorney in which he stated that he had never waived extradition and that he had told the California Parole Board, when the question of extradition came up, that he would die before being sent back to Alabama. After its independent examination of this letter the Fifth Circuit concluded that it could ". . . be a statement of his [the Respondent's] determination not to be returned to Alabama for trial." Mn. Op. p. 3172, Appendix B." This conclusion by the Fifth Circuit appears to be a restatement in different words of precisely what the State Courts found.

There was other evidence not discussed by the Fifth Circuit but which was before that Court and the State Courts. There was the fact that the Respondent had fled Alabama to avoid prosecution in the first place. There were defense exhibits presented in State Court and submitted in this case, showing that the Respondent had been eligible for parole and had appeared before the California Parole Board regularly beginning in 1964. And, there was the Respondent's own

statement, also part of his "bloody walls" testimony to the effect that everyone who had a detainer against him was required to waived extradition to the detaining jurisdiction as a condition to parole. On this evidence, the State Court concluded that the Respondent had obstructed his trial in Alabama by refusing to waive extradition and refusing to accept a parole to Alabama for trial. The Fifth Circuit reviewed the same evidence and concluded that the Respondent was merely asserting his legal right not to be returned to Alabama for trial. The First Circuit considered these findings to be in conflict and rejected the State Court finding in favor of its own.

In *LaVallee v. Delle Rose*, (410 U.S. 690, 35 L. Ed. 2d 637, 93 S. Ct. 1203 [1973]) this Honorable Court held that under 28 U.S.C. 2254(d) the finding of a State Court which met the conditions of that statute was presumed correct and placed on the Federal Habeas Corpus petitioner a heavy burden of establishing its incorrectness. *LaVallee v. Delle Rose* concerned a conflict in the testimony; the point could have gone either way depending on whom the Court believed. The instant case does not concern a conflict in the evidence. In fact, all of the evidence on this point came from the Respondent in one way or another. What is involved here is a question of interpretation. The State Court finding is at least as reasonable an interpretation as the Fifth Circuit's, indeed it is difficult to find any substantial difference between them. This case presents this question: Under 28 U.S.C. 2254(d) may a Federal Court of Appeals substitute its interpretation of the evidence for an interpretation of a State Court, where the State Court finding is reasonable?

This question has never been addressed by this Honorable Court and ought to be addressed in this case.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama respectfully submits that the decision and opinion of the Honorable United States Court for the Fifth Circuit conflicts with the prior decisions of this Honorable Court and that this case presents important questions which have not been but ought to be addressed by this Honorable Court. For these reasons the State of Alabama prays this Honorable Court to issue a writ of certiorari to review the opinion, decision and judgment of the Honorable United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

APPENDICES

APPENDIX "A"

PRINCE V. ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

NO. C. A. 73-A-601-S

ORDER AND EXAMINATION, REPORT
AND RECOMMENDATION TO THE DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS R. PRINCE,)
Petitioner)
—Vs—) NO. CA 73-A-601-S
STATE OF ALABAMA,)
Respondent)

O R D E R

The Court has carefully considered the pleading and exhibits on file in this case together with the report and recommendation of the U. S. Magistrate. The Court is impressed by the careful consideration given the issue before this Court by the Alabama Court of Criminal Appeals The Alabama Court of Criminal Appeals held in substance that Petitioner had not properly demanded a trial and suffered no prejudice in the delay in bringing him to trial. In this case, the Court feels that he cannot follow the recommendation of the U. S. Magistrate. This Court finds itself in agreement with the Alabama Court of Criminal Appeals that in spite of the long delay in bringing the Petitioner to trial, the Alabama Courts have properly applied the criteria established by the decision of the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1792) in deciding that Petitioner had not been unconstitutionally denied his right to a speedy trial. It is therefore ORDERED that the petition for habeas corpus be and it hereby is DENIED.

The Clerk is directed to furnish Petitioner, in care of Holman Unit, Atmore Prison, Route 2, Box 37, Atmore, Alabama 36502, the Honorable Robert R. Bryan, attorney of record for Petitioner, Frank Nelson Building, Birmingham, Alabama 35203 and the Honorable William Baxley, Attorney General, State of Alabama with a copy of the Magistrate's report and this Order.

DONE, this 31 day of July, 1973

C. W. Allgood
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS R. PRINCE,
Petitioner)
—Vs—) NO. CA 73-A-601-S
STATE OF ALABAMA,)
Respondent)

EXAMINATION, REPORT RECOMMENDATION TO THE
UNITED STATES DISTRICT JUDGE

Thomas R. Prince has filed in this Court, this his fourth, petition for habeas corpus. The instant case as well as the previous petitions, relate to charges made against Petitioner in the Circuit Court of Jefferson County, Alabama and the conviction of Petitioner on the aforesaid charges. Petitioner is now an inmate of the Alabama Prison System serving sentences imposed upon him in the Circuit Court of Jefferson County, Alabama.

HISTORY OF CASE

Before considering the issues and merits of the instant petition, it is well to consider in brief summary, the history of the habeas litigation instituted by Petitioner in this Court.

During the year, 1971, Petitioner was returned to the State of Alabama based on two indictments pending in the Circuit Court of Jefferson County charging Petitioner with the offense of armed robbery. After Petitioner's return to the State of Alabama and prior to being brought to trial on the aforesaid charges, Petitioner filed in this Court, a petition for habeas corpus in civil action 71-1003 in which he claimed that he had been denied a speedy trial and for this

reason, the charges pending against him should be dismissed. Petitioner pointed out that the indictments against him were filed in the Circuit Court of Jefferson County in May of 1962; that Petitioner had been in custody of California authorities continuously from the 29th day of June, 1962 until his return to Jefferson County, Alabama in 1971 and that his status as a California prisoner and later, a California convict, was at all times known to Alabama authorities. Before filling his habeas corpus petition —2— in CA 71-1003, Petitioner was afforded an evidentiary hearing in the Circuit Court of Jefferson County, Alabama on Petitioner's motion to dismiss the indictment. In his motion to dismiss the indictment, Petitioner contended that he had been denied the right to a speedy trial. After a lengthy hearing, the Circuit Court of Jefferson County denied Petitioner's motion to dismiss the indictment.

The details of the evidence considered by the Circuit Court of Jefferson County, Alabama in denying Petitioner's motion to dismiss the indictment are set out in the Magistrate's report in CA 71-1003; the contents of the aforesaid report are adopted herein by reference. In brief summary, the Magistrate recommended that the habeas corpus petition be denied primarily as a result of the demand-waiver rule enunciated by the Supreme Court in *Smith v. Hooey*, 393 U.S. 374.

An appeal was perfected from the denial of habeas corpus relief. On appeal, the Court of Appeals for the Fifth Circuit agreed with this Court that Petitioner's habeas corpus petition should be dismissed. However, the decision of the Fifth Circuit directed that the petition be dismissed on jurisdictional grounds on the basis that Petitioner was not then in custody pursuant to the judgment of the state court. This jurisdictional basis for dismissal being directed despite a previous ruling by the U. S. Court of Appeals for the Fifth Circuit in *May v. Georgia*, 409 F.2d 203, 5th Cir. (1969). The mandate of the Court of Appeals for the Fifth Circuit in *Prince v. Bailey*, 464 F.2d 544, 5th Cir. (1972) was carried out and the habeas corpus petition in CA 71-1003 was dismissed.

On August 1, 1972, Petitioner, filed his second habeas corpus petition, CA 72-694. Following his conviction and sentence in the Jefferson County cases heretofore referred to, Petitioner, in CA 72-694, again sought habeas relief alleging that he was then serving a sentence imposed by the Circuit of Jefferson County and that he had been denied a speedy trial. Habeas relief was denied in CA 72-694 for the reason that a direct appeal was then pending from Petitioner's conviction in the Circuit Court of Jefferson County, Alabama and that habeas consideration by the U.S. District —3— Court was premature.

An additional habeas corpus petition was filed by Petitioner in CA 73-135. Again habeas relief was denied because of prematurity.

On March 27, 1973, the Alabama Court of Criminal Appeals affirmed Petitioner's convictions and the sentences imposed upon him in the Circuit Court of Jefferson County, Alabama. On June 21, 1973, the instant petition for habeas corpus was filed on behalf of Petitioner. The issue raised in the instant case is identical to the issue raised in Petitioner's previous habeas corpus actions, i.e., did the State of Alabama unconstitutionally deny to Petitioner, his right to a speedy trial.

EXHAUSTION OF REMEDIES

Petitioner sought dismissal of the indictments pending against him in the Circuit Court of Jefferson County, Alabama on the basis that he had been denied his right to a speedy trial. On direct appeal from his convictions in the Circuit Court of Jefferson County, Petitioner urged as a basis

for reversal, this same alleged constitutional error. The Alabama Court of Criminal Appeals considered the speedy trial issue at great length in its affirmance of Petitioner's convictions. In view of the fact that the Alabama Court of Criminal Appeals has already passed upon Petitioner's constitutional claim, it is not necessary that Petitioner be required to seek collateral relief by way of coram nobis before this Court may consider the merits of the habeas corpus petition.* It is therefore the Magistrate's conclusion that Petitioner has exhausted all available effective state remedies and the issue raised by him in the instant petition must now be decided on its merits by the U. S. District Court.

SUMMARY OF PERTINENT FACTS

All of the factual information which relates to the issue before this Court may be found in the exhibits in CA 71-1003 and in the examination and report of the U. S. Magistrate in that case. By way of brief summary, the following are the pertinent facts: In May of 1962, two armed robberies occurred in the City of Birmingham, Alabama. On the 10th day of May, 1962, Petitioner was indicted by the Circuit Court of Jefferson County, Alabama for these two armed robberies. On June 29, 1962, Petitioner was arrested —4— in California on a charge of grand theft and armed robbery. On December 11, 1962, Petitioner was sentenced in the California state court at Los Angeles for a period of five years to life. On July 12, 1962, a detainer was filed on behalf of the Circuit Court of Jefferson County, Alabama with California authorities. During Petitioner's incarceration in California prior to July of 1968, Petitioner made numerous written requests to the Circuit Court and prosecuting attorney of Jefferson County, Alabama that the charges pending against him be dismissed. In July of 1968, Petitioner sent to the district attorney of Jefferson County, Alabama, a formal motion requesting that

*Certiorari denied by Alabama Supereme Court on June 7, 1973

the charges pending against him be dismissed because of the alleged denial to Petitioner of a speedy trial. It does not appear that this motion was ever filed in court or acted upon by a judge of the Circuit Court of Jefferson County.

On July 25, 1970, parole authorities of the State of California determined that a parole should be granted to permit Petitioner "to go to hold". The effect of this type of parole would have been that Petitioner would be available for extradition by Alabama authorities. Petitioner refused to sign the aforesaid condition of his parole. Petitioner was returned from California to Alabama on February 22, 1971.

During Petitioner's confinement in the State of California, he suffered two nervous breakdowns. From the latter part of 1962 until about June of 1967, Petitioner was confined in the Medical Facility at Vacaville, California. During a portion of this period of time, Petitioner was under heavy sedation and does not recall what action, if any, he took in relation to the charges pending in Alabama.

Petitioner was ultimately tried, convicted and sentenced in the Circuit Court of Jefferson County, Alabama on March 8, 1972, which said sentence he is now serving.

At all times during Petitioner's incarceration in the State of California,. his whereabouts were known to prosecuting officials of the Circuit Court of Jefferson County, Alabama. Prosecuting officials of the Circuit Court of Jefferson County, Alabama made repeated requests to California authorities to ascertain the release date of Petitioner and to notify —5— California authorities that Petitioner would be returned to Alabama at such time as Petitioner was made available to Alabama by California. Prosecuting officials of Jefferson County Alabama made no effort to secure the presence of Petitioner for trial in Alabama while Petitioner was incarcerated in the State of California during the period 1962 to 1971.

CONTROLLING AUTHORITIES

Habeas corpus relief was denied by this Court in CA 71-1003 on the basis of the application of the so-called "demand-waiver rule". The reasoning of this Court was that no demand for a speedy trial, within the meaning of the law as it then existed, had been made by Petitioner or on his behalf and in the absence of such demand, Petitioner had waived his right to assert the denial of a speedy trial as a defense to the actions pending against him in the Circuit Court of Jefferson County. The rapidly developing controlling decisions on the issue of speedy trial have placed this issue in a different light. The Supreme Court in *Klopfer v. North Carolina*, 386 U.S. 213 (1967) held that the Sixth Amendment guarantee of a speedy trial was applicable to the several states as a result of the Fourteenth Amendment. *Smith v. Hooey*, supra, approached the question in a situation where a defendant was held in custody by one sovereign with charges pending against him by another sovereign. The Court reaffirmed the application of the Sixth Amendment guarantee of the right to a speedy trial and the Court declared that upon the demand of a defendant for a speedy trial, the Court where the charges were pending was obligated to make a diligent, good faith effort to secure the presence of such defendant for trial. *Smith v. Hooey*, supra, is the basis for the demand-waiver rule. In 1970 the Supreme Court of the United States rendered its opinion in *Dickey v. Florida*, 398 U.S. 30 (1970). In this case the Court held that Petitioner was at all times available for the State of Florida, demand had been made by Petitioner for a speedy trial, trial was delayed for a period of seven years and during this period of time the Petitioner had suffered actual prejudice in the preparation of his defense. In *Dickey*, supra, the Court reaffirmed its holding in *Smith v. Hooey*, supra, and *Klopfer v. North Carolina*, supra, and further held that when a speedy trial had been —6— denied without justifiable excuse, the conviction should be vacated and set aside.

The demand-waiver rule remained intact until the Supreme Court again considered the issue of denial of a speedy trial in *Barker v. Wingo*, 407 U.S. 514 (1972). The demand-waiver rule was substantially modified, if not rejected, by the Supreme Court in *Barker*, supra. The Court pointed out that a defendant's constitutional right to a speedy trial cannot be established by an inflexible rule; further, the Court held that in making a determination concerning the alleged denial of a speedy trial, a court should consider such factors as the length of and reason for the delay, the defendant's assertion of his right and the existence of any serious prejudice to Petitioner.

The next step taken by the Supreme Court for the United States in developing the applicable law to be applied on the issue of denial of a speedy trial, was the Court's decision in *Braden v. 30th Judicial Circuit Court of Kentucky*, ——— U.S. ———, February 28, 1973. Prior to the decision in *Braden*, supra, there was some uncertainty as to whether a defendant confined in one jurisdiction could maintain a habeas corpus petition in another jurisdiction where charges were pending against such defendant. The Supreme Court removed all doubt as to this matter in *Braden*, supra, by holding that a prisoner confined in the State Courts of Alabama could maintain a habeas corpus petition in the U. S. District Court of Kentucky in his effort to have state charges pending against him in Kentucky dismissed on the basis that the defendant had been denied his right to a speedy trial. The U. S. Court of Appeals for the Fifth Circuit had recognized and applied this principle of law prior to the decision of the Supreme Court in *Braden*, supra. (See in this connection, *May v. Georgia*, supra.)

Finally, the U.S. Supreme Court has defined the proper

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relief to be granted in the event a speedy trial has been denied. The Supreme Court has stated that when a defendant's right to a speedy trial has been denied, the only possible remedy is dismissal of the charges and discharge of the defendant. *Strunk v. U. S.*, —— U. S. ——, June 11, 1973.

—7—

CONCLUSION

It is the Magistrate's opinion and conclusion that the reasoning of this Court in denying habeas relief in CA 71-1003 is no longer tenable. As pointed out hereinabove, the demand-waiver rule can no longer be automatically applied. In the instant case, serious criminal charges were pending against the Petitioner for a period of approximately nine years. During substantially all of this period of time, Petitioner's whereabouts were known to prosecuting officials of Jefferson County, Alabama. During this entire period of time, the State of Alabama made no effort to secure the presence of the Petitioner for trial. Prior to 1968, Petitioner made repeated requests that the charges against him be dismissed. In 1968, Petitioner submitted a motion to prosecuting officials of the Circuit Court of Jefferson County demanding that the charges be dismissed based on the denial of a speedy trial.

Based upon the facts in this case and the applicable legal authorities, it is the Magistrate's conclusion that Petitioner has been denied a speedy trial. The Magistrate further concludes that the denial of a speedy trial cannot be justified under the applicable controlling authorities. It is therefore recommended that the petition for habeas corpus be granted.

DATED, this 25th day of July, 1973.

R. MACEY TAYLOR
UNITED STATES MAGISTRATE

APPENDIX "B"

PRINCE V. ALABAMA

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-3108

OPINION, JUDGMENT, AND
DENIAL OF REHEARING

3146

Thomas R. PRINCE, Petitioner-Appellant,

v.

STATE OF ALABAMA, Respondent-Appellee.

No. 73–3108.

United States Court of Appeals,
Fifth Circuit.

Jan. 31, 1975.

Petitioner, an inmate in Alabama state prison, petitioned for habeas corpus. The United States District Court for the Northern District of Alabama, at Birmingham, Clarence W. Allgood, J., denied the petition on grounds articulated by the Alabama Court of Criminal Appeals and the petitioner appealed. The Court of Appeals, Simpson, Circuit Judge, held that the petitioner asserted his speedy trial right, at least as early as October, 1963 and no later than July, 1968; that an unreasonable period of two and one-half years' delay followed the assertion before the petitioner was taken into custody by Alabama officials; that the delay in returning petitioner to Alabama from California where he was incarcerated was solely due to failure of State of Alabama to make a diligent, good-faith effort to secure petitioner's presence for trial prior to his release by California; that petitioner had been prejudiced by the delay and that petitioner was denied his right to speedy trial.

Reversed and remanded.

1. Constitutional Law ⇐268(4)

The Sixth Amendment right to a speedy trial is among those fundamental constitutional rights made applicable to the states through the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

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2. Criminal Law ⇐573

The protections afforded by the right to speedy trial are not diminished because a criminal defendant may be incarcerated under a lawfully imposed sentence outside the jurisdiction seeking to prosecute him. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law ⇐573

Where petitioner, who was under indictment in Alabama for armed robbery, was incarcerated in California, the State of Alabama was under a constitutionally imposed mandate to afford the petitioner a speedy trial. U.S.C.A.Const. Amends. 6, 14.

4. Criminal Law ⇐573

In determining whether a criminal defendant's right to speedy trial has been abridged, the court must consider the length of delay, the reasons for delay, the defendant's assertion of his right and the prejudice to the defendant. U.S.C.A. Const. Amends. 6, 14.

5. Criminal Law ⇐573

Neither length of delay, reason for delay, the defendant's assertion of his right to speedy trial nor prejudice to the defendant are necessary or sufficient conditions to the finding of deprivation of right to speedy trial; rather, they are related factors and must be considered together with such other circumstances as might be relevant. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐573

In ordinary cases, delay in a case in which deprivation of speedy trial is alleged is computed by considering length of time elapsed between the indictment and trial. U.S.C.A. Const. Amends. 6, 14.

7. Criminal Law ⇐573

Although the length of time elapsed between indictment in Alabama on 1962 robbery charges and trial was ten years, the length of delay for purposes of claim of deprivation of speedy trial was eight years where petitioner was not realisti-

cally available to Alabama authorities until after his trial and conviction in California and the delay between Alabama's taking custody of petitioner in February, 1971, and his trial on robbery charges in March, 1972, was attributable in part to delays occasioned by the petitioner. U.S.C.A.Const. Amends. 6, 14.

8. Criminal Law ⇐575

Delay of eight years in bringing petitioner to trial in Alabama on robbery charges was inordinate. U.S.C.A.Const. Amends. 6, 14.

9. Criminal Law ⇐576(8)

In considering claims of deprivation of speedy trial rights, the courts should take a liberal view of convict-defendant's attempts to contact the prosecutors and courts in other jurisdictions regarding charges pending against him there as demands for speedy trial. U.S.C.A.Const. Amends. 6, 14.

10. Criminal Law ⇐576(8)

Relevant factors to be considered in determining the sufficiency of the accused's attempts to assert his speedy trial right include whether he had the assistance of counsel and whether he was properly advised, by counsel or otherwise. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law ⇐576(8)

A criminal defendant may assert his right to speedy trial by communications either to court or to the prosecution. U.S.C.A.Const. Amends. 6, 14.

12. Criminal Law ⇐576(8)

Where petitioner, incarcerated in California, in July, 1968, mailed motion to dismiss charges on ground of denial of speedy trial to state solicitor in Jefferson County, Alabama and petitioner had written Alabama authorities in October, 1963, the petitioner placed the prosecution on notice that he was preserving his speedy trial claim as to 1962 charges upon which petitioner was tried in 1972 and petitioner effectively

asserted his speedy trial right at least as early as October, 1963 and not later than July, 1968. U.S.C.A.Const. Amends. 6, 14.

13. Criminal Law ⇐575

State of Alabama had duty to take affirmative action to secure petitioner's return from California for trial and mere inquiries about release and availability were not compliance with the duty; attempts at extradition or the issuance of a writ of habeas corpus ad prosequendum by the Alabama courts would have been in the nature of such affirmative "good-faith" effort to secure petitioner's presence for trial prior to the date of his scheduled release in California. U.S.C.A.Const. Amends. 6, 14; Code of Ala., Tit. 15, § 70 et seq.

14. Criminal Law ⇐575

Where petitioner's motive in refusing parole in California in December, 1970, was to insure that he would not have to be returned to California upon disposition of matters in Alabama and petitioner waived extradition to Alabama once the matter of his return to California was resolved to his satisfaction and it resulted in only a two months' delay in Alabama's gaining custody, petitioner's refusal to accept parole subject to extradition to Alabama and refusal to waive extradition did not relieve Alabama of its constitutional duty to attempt to secure petitioner's presence for trial. U.S.C.A.Const. Amends. 6, 14; Code of Ala., Tit. 15, § 70 et seq.

15. Habeas Corpus ⇐85.5(1)

Petitioner's statement in letter to an attorney in California, whose assistance he sought, that he had made statement to California Parole Board that "* * * I would die before I be sent back to Alabama" did not fairly support finding that petitioner advised California authorities at every appearance before California Parole Board that he would not waive extradition to Alabama and that he had frustrated the efforts of Alabama to return him for a speedy trial. U.S.C.A.Const. Amends. 6, 14.

16. Habeas Corpus ⇐85.2(1)

In habeas corpus action in which release was sought on basis of denial of speedy trial, the State of Alabama had burden of showing that petitioner had, by his actions, actually frustrated his return to Alabama from California for trial. U.S.C.A.Const. Amends. 6, 14.

17. Habeas Corpus ⇐90

Where state court's finding that habeas corpus petitioner thwarted attempts to secure his return from California to Alabama for trial on pending robbery charges was not, in fact, fairly supported by the record, the state court finding was entitled to no weight in federal habeas corpus proceeding. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d)(8).

18. Criminal Law ⇐573

Where petitioner had asserted his right to speedy trial on 1962 Alabama indictment for robbery as early as October, 1963, and at the latest by July, 1968, and the primary reason for delay until 1971 in returning petitioner from California to Alabama for trial was failure of Alabama authorities to initiate meaningful efforts to obtain his return, petitioner was denied right to speedy trial. U.S.C.A.Const. Amends. 6, 14.

19. Criminal Law ⇐573

Where the factors of length of delay, criminal defendant's assertion of his right to speedy trial and the reasons for the delay coalesce in the defendant's favor, prejudice is immaterial in determining whether there was deprivation of right to speedy trial. U.S.C.A.Const. Amends. 6, 14.

20. Criminal Law ⇐573

The speedy trial right is designed to protect against two distinct types of prejudice—prejudice to the defendant's defense and prejudice to his person. U.S.C.A.Const. Amends. 6, 14.

21. Criminal Law ⇐576(11)

When the defendant has established a prima facie case of denial of speedy trial right, the burden is upon the state to show that the defendant has not, as result of the delay, been prejudiced in his defense with respect to the reliability and integrity of the fact-finding process. U.S.C.A.Const. Amends. 6, 14.

22. Criminal Law ⇐573

There was prejudice to the petitioner's person as result of denial by State of Alabama of speedy trial right where the pendency of detainers had adverse effect of his being considered for most favorable rehabilitation and parole program in California, petitioner lost opportunity for a California state job because of detainers, he was held in medium security and became ineligible for part-time, work-release programs and the possibility of Alabama sentence running concurrently with California sentence was foreclosed. U.S.C.A.Const. Amends. 6, 14.

23. Criminal Law ⇐573

Where petitioner asserted his speedy trial right, at least by July 1968, an unreasonable period of two and one-half years' delay followed the assertion before petitioner was taken into custody by Alabama officials, the delay was attributable solely to the failure of Alabama officials to make a diligent, good-faith effort to secure the petitioner's presence for trial prior to his release by California authorities and petitioner had been prejudiced by the delay, delay of at least eight years between indictment and trial constituted a denial of right to speedy trial. U.S.C.A.Const. Amends. 6, 14.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, SIMPSON and INGRAHAM, Circuit Judges.

SIMPSON, Circuit Judge:

We review a denial of a habeas corpus petition which alleged that the appellant, Thomas R. Prince, was not afford-

ed his Sixth and Fourteenth Amendment right to a speedy trial by virtue of a nine year delay between his indictment in Alabama on two counts of robbery and subsequent trial on those charges. The district court denied the petition on grounds articulated by the Alabama Court of Criminal Appeals, which had similarly denied Prince's appeal for post-conviction relief. The Alabama court found that Prince had not been denied his speedy trial right because: (i) Prince had made no serious demand for a speedy trial; (ii) Prince was not "available" for return to Alabama for trial because of his incarceration in California; and (iii) Prince had thwarted attempts by the State of California to grant his parole by refusing to waive extradition to Alabama. Prince v. State, Ala.Cr.App. 1973, 50 Ala.App. 368, 279 So.2d 539, 542–545.

Our review of the record convinces us that the Alabama court erred as a matter of law in determining that Prince had not effectively demanded a speedy trial and that Prince was not "available" for extradition to Alabama during the period of his incarceration in California. We further find no substantial support in the record for the Alabama court's finding that Prince thwarted California's attempts to grant his parole, with the exception of a single instance of insignificant import. Accordngly, we reverse and remand for the granting of the appropriate relief.

I. Facts

The State of Alabama acquired an interest in the appellant, Prince, as a result of two robberies both allegedly occurring in Birmingham, Jefferson County, Alabama, on May 7, 1962. In one incident a local A & P food store was robbed of $160 at gunpoint; the robber fired a shot at the store manager as he was leaving the store. A second incident involved the taking of $140, again at gunpoint, from an individual with whom the appellant had been shooting dice. Both the cashier of the A & P store and the disgruntled crapshooter identified Prince as the robber. A Jefferson County, Alabama, grand jury returned indictments on May 10, 1962 charging Prince with the two robberies.

Less than two months later, on June 29, 1962, Prince was arrested in Los Angeles, California, and charged with grand theft and armed robbery. Upon learning of Prince's arrest, Emmet Perry, the State Solicitor for Alabama's 10th Judicial Circuit, having jurisdiction over Jefferson County, lodged a detainer with the Los Angeles Sheriff's Department on July 12, 1962. The letter from Solicitor Perry to the Los Angeles County Sheriff's department read in pertinent part:

> [P]lease let us know the status of the pending charges there and the likelihood of his being returned here. *If he should become available* please ascertain if he will waive extradition, and if so, notify this office and we shall promptly send our agent for him. (Emphasis supplied)

The reply was in kind: "Your Warrant has been filed as a Detainer, . . . and you will further be advised *if and when this subject is available* to your department." (Emphasis supplied). As it developed, Prince did not become "available" for almost nine years.

Prince was convicted on the grand theft and robbery charges in Los Angeles Superior Court and received on December 11, 1962, concurrent sentences of six months to ten years and five years to life. Prince was then transferred to the custody of the California Department of Corrections (CDC) Reception-Guidance Center at Chino, California. At this time, CDC wrote to the Sheriff of Jefferson County, Alabama, and inquired about the existence of any detainers against Prince. In reply, Solicitor Perry informed the CDC of the outstanding indictments against Prince, and requested that CDC "[p]lease advise the approximate release date . .. This office will extradite at our expense." The CDC answered: "You will be given the usual sixty (60) days' notice prior to his release from the Department of Corrections."

It appears that Prince was transferred to the CDC Medical Facility at Vacaville, California. The Solicitor of Jefferson County was advised of Prince's transfer on February 27, 1963. He remained at Vacaville until June 1967. In April 1964, CDC—Vacaville notified Solicitor Perry that Prince would be appearing before the Adult Authority for parole and sentence consideration in June 1964, and sought a response as to Alabama's intentions with regard to Prince at that time. The Solicitor's reply was: "It is our intention to take custody of subject when he is released by you." Similar exchanges between CDC and the Solicitor's office in Birmingham are reflected annually through 1967. Each letter from the Solicitor's office to CDC iterated Alabama's intention to return Prince for trial on the pending charges "when available." The only indication in the record as to the outcome of Prince's appearances before the Adult Authority is contained in a letter from CDC to Earl C. Morgan, Perry's successor in office as Solicitor for the 10th Judicial Circuit of Alabama, in which the CDC stated that Prince was denied parole at his April 1966 hearing before the Adult Authority.

In the meantime, Prince had communicated with the Solicitor's office on his own behalf. His letters were essentially requests that Alabama withdraw its detainer or dismiss its charges against him to aid in his receiving the most favorable treatment and training programs offered by CDC. In his first letter, dated October 28, 1963, Prince stated his concern as follows:

> I am endeavering to take advantage of the excellent Mental Health Program in the State of California. This state has facilities for out patient Psycho Therapy for parolee's to attend under close supervision of Psychiatrists in cordination with the supervision by the California Parole Department.
>
> I do not except to be released at a early date, but if your County drops there hold I will be eligible for the future continuous Mental Health Program. Then on completion, I would become eligible to be paroled out to a Out Patient Clinic, in this State, under there guidance and there full responsibility.
>
> This a long range program of many years, but with your cooperation and consideration I will be well on the road to a complete recovery and able to be a better citizen to society.
>
> This request will be deeply appreciated and relieve my many worries for the future.

The record does not indicate that Prince received any reply from the Solicitor's office in response to this communication. In October 1965, Prince again wrote requesting that charges be dropped and furnished as a basis for his request his belief that he had been rehabilitated by his experience under the care of the CDC. Again Prince apparently received no response from the Solicitor's office for pencilled in on the bottom of Prince's letter from the Solicitor's file is the notation "No necessity for a reply." Following the notation are the initials "B.H.", the record containing no clue to the identity of "B.H." Prince wrote a third letter to the Solicitor's office in November 1966, again asking that the detainers be withdrawn and stating that their pendency was having an adverse impact on his consideration for parole programs in California. This time, he received the following response from Solicitor Morgan: "[T]his is to advise that disposition of the cases pending against you cannot be made until you are returned to this jurisdiction." This exchange ended Prince's attempts to deal directly with the Solicitor's office in Birmingham so far as the record discloses.

On June 12, 1967 Prince was transferred from the Medical Center at Vacaville to the CDC facility at San Quentin Prison. Prince turned at about this time toward use of the judicial process to have the Alabama charges dismissed. He sought the assistance of nearly a dozen attorneys or organizations, such as the NAACP, in his efforts. He received, with one exception—assistance from a law student at Hastings College

of Law in San Francisco—little more than helpful advice and polite "No-thank-yous."

On his own behalf and with the assistance of the Hastings law student acting under the tutelage of a licensed attorney Prince filed a petition writ of habeas corpus in the Superior Court for Marin County, California, seeking to have the Alabama detainer declared unenforceable in the courts of California on grounds that Alabama had denied him his right to a speedy trial. The petition was denied and Prince appealed to the California First District Court of Appeal. While this appeal was pending, Prince also filed a Petition for Writ of Habeas Corpus with the United States District Court for the Northern District of California. The federal court dismissed the petition without prejudice to its renewal when state remedies had been exhausted. Thereafter, Prince's appeal was decided adversely by the state District Court of Appeal, and Prince sought review by the California Supreme Court. When his petition was there denied, he returned to federal district court to seek habeas relief. His petition to that court was pending at the time of his release to Alabama officials in February, 1971.

During the period after his transfer to San Quentin, Prince had also sought relief from the courts of Alabama and from the Governor of that state. In July 1968 Prince forwarded to the Solicitor in Jefferson County a *pro se* "Motion to Set Aside the Information or to Dismiss the Information." Grounds alleged in support of his motion were the denial of his right to a speedy trial under the Sixth and Fourteenth Amendments to the Constitution. Prince intended perhaps for the Solicitor to file the Motion in the Tenth Judicial Circuit Court on his behalf, but the record does not indicate that the papers were ever filed with the court. Subsequently, Prince petitioned the Alabama Supreme Court to grant his motion. His papers filed in federal district court in California indicate that this Motion was denied by the Alabama Supreme Court.

In May 1969, Prince wrote to the Governor of Alabama seeking his assistance in having the robbery charges dismissed. He explained the circumstances leading to the issuance of the indictment in Alabama, the progress he had made toward rehabilitation in the custody of the CDC, the lack of response from the Alabama state courts to his motions, and his hopes for parole in California. His letter was forwarded to the Solicitor in Jefferson County by a member of the Governor's staff with the notation:

> I am enclosing a letter from one of your constituents who is having a little difficulty at the present time. This man is obviously not guilty because he says so in his letter. Thought you might get a kick out of it.

The Governor's office never responded directly to Prince.

Having thus far failed in his attempts to have the Alabama charges pending against him dismissed, Prince made his annual appearance before the Adult Authority in California for consideration for parole or sentence adjustment in 1970. At that time, Prince was granted parole "to go to hold," meaning that he would be paroled subject to the right of Alabama authorities to take custody of him. The State of California, under this type of parole, retained the power to order Prince's return to CDC upon (i) Alabama's failure to take custody or (ii) his release by Alabama authorities. In October 1970, Prince executed a waiver of extradition form, and preparations were made for his return to Alabama. However it appears that in December 1970 Prince rescinded his consent to accept parole "to go to hold," and his case was recalendared for further consideration by the Adult Authority. Upon reconsideration, the Authority granted Prince's request that he be paroled "subject to hold," meaning that he would be paroled subject to the right of Alabama authorities to take custody under their detainer, but that the State of California would not retain the right to return Prince to custody of the CDC except, we assume, for violations of the conditions of

parole including conviction for a separate offense. Again Prince waived extradition, and Alabama authorities took custody of him upon his release on February 22, 1971. Here began the second leg of the procedural odyssey which has brought Prince once again before this court.[1]

Upon his return to Alabama, Prince filed a Motion to Dismiss the Indictment and a Petition for Writ of Habeas Corpus in the Circuit Court for Jefferson County, both based on denial of his right to a speedy trial. An evidentiary hearing on the Motion was held before Judge Elias C. Watson of that court on September 8, 1971. After taking considerable testimony and receiving numerous exhibits, the Judge denied the Motion and Petition. Prince then sought habeas in the United States District Court for the Northern District of Alabama, where relief was withheld on the ground that Prince had not been denied his speedy trial right. On appeal, we affirmed on jurisdictional grounds, holding that the district court lacked jurisdiction to entertain Prince's Petition under Title 28 U.S.C. Sec. 2254(a) since Prince was at that time not in custody "pursuant to the judgment of a State court." Prince v. Bailey, 5 Cir. 1972, 464 F.2d 544.

Prince was finally tried by the State of Alabama on the robbery charges in March of 1972. He was convicted and received a twenty year sentence. Speedy trial grounds were a part of the basis for his ensuing appeal to the Alabama Court of Criminal Appeals. While his appeal was pending, he returned to federal district court with another habeas corpus petition. This petition also was denied, and we affirmed on jurisdictional grounds, ruling that under Title 28 U.S.C. Sec. 2254(b) & (c) federal courts should not accept jurisdiction until Prince had exhausted his available state remedies. Prince v. Alabama, 5 Cir. 1973, 476 F.2d 298.

1. See Prince v. Alabama, 5 Cir. 1973, 476 F.2d 298, and Prince v. Bailey, 5 Cir. 1972, 464 F.2d 544. Jurisdictional grounds prevented consideration by this court of the merits of Prince's claim to relief on those prior occasions, as the text, infra, relates.

On March 27, 1973, the Alabama Court of Criminal Appeals issued its decision affirming Prince's conviction and holding that Prince had not been denied his Sixth and Fourteenth Amendment rights to speedy trial by virtue of the delay in being brought to trial in Alabama. Prince v. State, Ala.Cr. App.1973, 50 Ala.App. 368, 279 So.2d 539.

We detail the basis for its decision regarding speedy trial claim because of the reliance by the federal district court upon the Court of Criminal Appeals decision in denying Prince's habeas corpus petition. The Alabama appellate court, found:

> On July 9, 1968, appellant sent to the district attorney in Birmingham, to be filed in the Circuit Court, a request for trial upon the charges presently pending against him. This request was never filed nor answered. During this period of time, appellant was eligible for parole in California, and had appeared before the parole board beginning in 1964. However, appellant would not accept the condition of the parole, i. e., releasing him to the State of Alabama for trial, but refused extradition until 1971. Appellant also during this period refused to waive extradition, and as a consequence remained in confinement until his actual parole release date to Alabama.
>
> The State of Alabama, beginning July 12, 1962, requested, of California, the appellant for trial, and on this date filed detainers against him. Continuously from July 12, 1962, until February 1, 1971, the State of Alabama informed California that when appellant was available, Alabama desired to return appellant to this State for trial.
>
> The State of California never notified Alabama that appellant would be available or released, until he was paroled on February 22, 1971.[4] The Chief Executive for the State of Alabama issued a requisition warrant to the State of California upon which the Governor of California issued a rendition warrant and released the appellant to Alabama for trial. (Footnotes 1–3 omitted)

* * * * * * * * * *

(4. Apparently, due to appellant's refusal of extradition, California elected to require appellant to complete his sentence before releasing him to Alabama. Clearly, the appellant could not both demand trial in Alabama on the one hand, and refuse to appear on the other. * * *).

279 So.2d at 540–541. The Court of Criminal Appeals then turned to a discussion of the relevant cases. After quoting at length from Dickey v. Florida, 1970, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26, and Barker v. Wingo, 1972, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, the court concluded:

> [W]e find that from the period from 1962 until the mailing of his "demand" to the district attorney in Birmingham in 1968, the appellant's efforts were largely frivolous, being in the nature of the letters seeking dismissal of the charges rather than a good faith demand of trial to vindicate his position. Also equally sufficient is the fact that from 1962 through 1971, the State of Alabama had made some thirteen separate requests of California, seeking information as to the early release of the appellant to the State of Alabama for trial. * * * Because of these circumstances, we are of the opinion that the State of Alabama secured the presence of the appellant as soon as it could because the State of California at no time had indicated that the appellant would be made available for trial in Alabama prior to releasing the appellant in 1971.

* * * * * * * * * *

In light of these authorities, it is clear that the State of Alabama, under the facts presented by the record on appeal in this case, had no opportunity to exercise its jurisdiction over the appellant for the offense charged until his return to the State of Alabama in 1971; therefore, the trial court correctly denied appellant's motion for a speedy trial dealing with the period of incarceration in California prior to his return to the State of Alabama. (citations and footnotes omitted). 279 So.2d at 544 & 545.

Thus at long last having exhausted his available state remedies, Prince returned to the federal district court seeking habeas corpus relief. The court again denied the petition on the merits, stating:

> This court finds itself in agreement with the Alabama Court of Criminal Appeals that in spite of the long delay in bringing the petitioner to trial, the Alabama Courts have properly applied the criteria established by the decision of the Supreme Court in Barker v. Wingo, [citation omitted] in deciding that petitioner had not been unconstitutionally denied his right to a speedy trial.

This appeal followed.

II. The Speedy Trial Right

[1, 2] The right of criminal defendants to a speedy trial though of long standing,[2] has only recently received jurisprudential emphasis in Anglo-American courts.[3] The Sixth Amendment right is among those fundamental constitutional rights made applicable to the States through the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina, 1967, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1. The protections afforded by the right are, moreover, not diminished because a criminal defendant may be incarcerated under a lawfully imposed sentence outside the jurisdiction seeking to prosecute him. Smith v. Hooey, 1969, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607; May v. Georgia, 5 Cir. 1969, 409 F.2d

2. See, Note, The Lagging Right to a Speedy Trial, 51 Va.L.Rev. 1587 (1965) (hereinafter cited as Lagging Right).

3. The historical origins of the right have been adequately discussed elsewhere and require no restatement here. See, e. g., Klopfer v. North Carolina, 1967, 386 U.S. 213, 223–226, 87 S.Ct. 988, 993–995, 18 L.Ed.2d 1, 8–9; Petition of Provoo, D.Md.1955, 17 F.R.D. 183, 196–197; Lagging Right, supra, note 2, at 1594.
For general discussions of the right, see J. Godbold, Speedy Trial—Major Surgery for a National Ill, 24 Ala.L.Rev. 265 (1972); Note, The Right to a Speedy Trial, 20 Stan.L.Rev. 476 (1968) (hereafter cited as Note, Speedy Trial); Lagging Right, supra, note 2.

203.[4] The Supreme Court has held that a State is required, through the use of writs of extradition, writs of habeas corpus *ad prosequendum*, or whatever other means may be available, to make a "diligent, good-faith effort" to secure a convict incarcerated out of state for a prompt trial on pending charges. Smith v. Hooey, supra, 393 U.S. at 383, 89 S.Ct. at 579, 21 L.Ed.2d at 614. We have held this requirement to apply retroactively to the States. Hoskins v. Wainwright, 5 Cir. 1973, 485 F.2d 1186 (*Hoskins III*; see note 4, supra).

[3–5] The State of Alabama, therefore, was under a constitutionally imposed mandate to afford the appellant here a speedy trial. In deciding whether, as the appellant alleges, Alabama has failed to comply with this mandate, we must undertake a "functional analysis of the right in [this] case." Our analysis is keyed to the four factors outlined by the Supreme Court in Barker v. Wingo, 1972, 407 U.S. 514, 530, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101, 117: the length of delay, the reasons for delay, the defendant's assertion of his right, and the prejudice to the defendant.[5] In evaluating Prince's claim in light of these four factors, we are mindful that:

> [N]one of the four factors . . . [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker v. Wingo, supra, 407 U.S. at 533, 92 S.Ct. at 2193, 33 L.Ed.2d at 118.[6]

4. See also Strunk v. United States, 1973, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56; Braden v. 30th Judicial Circuit Court, 1973, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443; Dickey v. Florida, 1970, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26; Hoskins v. Wainwright, 5 Cir. 1971, 440 F.2d 69 (*Hoskins I*), after remand, 1972, 472 F.2d 158 (*Hoskins II*), on rehearing, 1973, 485 F.2d 1186 (*Hoskins III*). For a general discussion of the applicability of the speedy trial right to the convict, see Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 L.J. 767 (1968) hereinafter cited as Effective Guaranty).

5. Mr. Justice Powell in Barker v. Wingo essentially restated the approach which other courts and commentators had recognized as the crucial considerations in adjudicating claimed denials of the speedy trial right. See, e. g., United States v. Auerbach, 5 Cir. 1969, 420 F.2d 921, 924 (per curiam); United States v. Mann, S.D.N.Y. 1968, 291 F.Supp. 268; Note, Speedy Trial, supra, note 2, 20 Stan.L.Rev. at 478.

A. Length of Delay

[6–8] The routine approach to computation of delay in speedy trial cases is to consider the length of time elapsed between indictment and trial—fully ten years in the instant case. Two factors require that we pursue a modified approach here, however. First is the fact that Prince was not realistically available to Alabama authorities until after his trial and conviction in California, when he was committed to the custody of the California Department of Corrections in December 1962. Second is recognition that the delay between Alabama's taking custody of Prince in February 1971 and his trial on the robbery charges in March 1972 was attributable in part to delays occasioned by Prince himself. Without exploring this latter period in detail, we calculate the length of delay for purposes of our inquiry here to have been roughly eight years—from December 1962 to February 1971. This delay, like the 8½ year delay we considered in Hoskins v. Wainwright, (*Hoskins I*) supra, note 4, 440 F.2d 69, 71, was patently "inordinate." It remains to be determined whether it was also "unjustified." Id.

6. We held, for example, in *Hoskins III*, supra, that a showing of prejudice would be unnecessary where the findings as to the other three factors coalesced in the defendant's favor. 485 F.2d at 1192. On this approach, see generally The Supreme Court, 1971 Term, 86 Harv.L.Rev. 50, 164–71.

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B. The Defendant's Assertion of His Right

Prior to the decision of the Supreme Court in Barker v. Wingo, supra, the majority rule was that a defendant who failed to make prompt demand for a speedy trial was deemed to have waived that right for the period up to the time of his first demand.[7] This rule, known as the "demand-waiver" rule, was rejected in *Barker*. There, the Court recognized the compatibility of the fundamental nature of the speedy trial right, Klopfer v. North Carolina, supra, and the presumption against waivers of fundamental constitutional rights first enunciated in Johnson v. Zerbst, 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.

Accordingly, the Court in *Barker* substituted for the rigid demand-waiver rule a more flexible approach in which the defendant's assertion of his speedy trial right became merely one of the several factors to be considered in determining whether the right had been abridged. While the Court indicated that the absolute failure of the defendant to assert his right would "make it difficult for [him] to prove that he was denied a speedy trial," the Court emphasized that the burden was upon the prosecution to show that the failure of the defendant to assert his right was a knowing failure:

> In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. 407 U.S. at 529, 92 S.Ct. 2191, 33 L.Ed.2d at 116.

In determining whether Prince made an adequate assertion of his speedy trial right, we are further guided by *Barker* and by the Court's subsequent decision in Strunk v. United States,

7. See Barker v. Wingo, 407 U.S. at 524–528, 92 S.Ct. at 2188–2189, 33 L.Ed.2d at 113–115; Bruce v. United States, 5 Cir. 1965, 351 F.2d 318, cert. denied 384 U.S. 921, 86 S.Ct. 1370, 16 L.Ed.2d 441. But see Murray v. Wainwright, 5 Cir. 1971, 450 F.2d 465, 469.

1973, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56. In *Barker*, the Court noted that a flexible approach to determination whether the defendant had asserted his speedy trial right

> would permit . . . a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 116.

In *Strunk*, the Court gave an implicit indication that the focus of the assertion inquiry might properly be directed toward the question whether the prosecution is put "on notice" of the defendant's speedy trial claim. There, the Court said:

> The entire course of events from the time of arrest through the Court of Appeals plainly placed the Government on notice that the speedy trial issue was being preserved by the accused and would be pressed, as indeed it has been. 412 U.S. at 436, 93 S.Ct. at 2262, 37 L.Ed.2d at 59.[8]

[9–11] We interpret these rulings as an indication that the courts should take a liberal view of convict-defendants' attempts to contact the prosecutors and courts in other jurisdictions regarding charges pending against them there.[9] Such

8. In *Strunk*, the defendant had indicated to Federal Bureau of Investigation agents that he intended to assert his speedy trial right by moving for trial under F.R.Crim.P. 20. In anticipation of this motion, it appears that the prosecution delayed initiation of any action against the defendant for a period of several months. The Court of Appeals ruled that the defendant had been denied his right to a speedy trial due to the delay and ordered that the defendant be credited with time served during the delay toward fulfillment of his sentence. The defendant appealed and argued that the remedy should have been dismissal, not merely credit for time served. The government, however, took no cross-appeal from the Court of Appeals' speedy trial ruling. The speedy trial issue thus was not before the Supreme Court.

9. Consideration of the Supreme Court's discussion in *Barker*, supra, 407 U.S. pages 523–530, 92 S.Ct. 2188–2192, 33 L.Ed.2d 52–57, of its reasons for adopting a balancing test and its consequent rejection of the two prior inflexible approaches, (a) the fixed time period, and (b) the demand-waiver rule, convinces us that it is no longer appropri-

an approach would be consistent both with the concept that chargeable failure to assert a constitutional right must be both knowing and intelligent, Johnson v. Zerbst, supra, and with the realities of a defendant's incarceration, often distant from the prosecuting state and without the effective assistance of counsel.

[12] Here Prince first raised the speedy trial issue in those terms with Alabama officials in July 1968 when he mailed his motion to dismiss the charges, based upon the asserted denial

ate, if it ever was, to draw a distinction between requests addressed to the prosecutor and demands made upon the court in determining whether a sufficient assertion of the constitutional right to speedy trial has occurred.

The Supreme Court in *Strunk*, supra, though not dealing with the question directly, implied that demands addressed to prosecuting officials are sufficient to assert the right. Accord, Wylie v. Wainwright, S.D.Fla.1973, 361 F.Supp. 914, 916.

In our view it now suffices to assert the right either to court or to prosecution, and we find no reason to adopt a rigid rule as to the form of the demand to be made. Relevant factors to be considered in determining the sufficiency of the accused's attempts to assert his speedy trial right should include whether he had the assistance of counsel and whether he was properly advised, by counsel or otherwise. Barker v. Wingo, supra, 407 U.S. at 529, 92 S.Ct. at 2191, 33 L.Ed.2d at 116. Consideration of these factors differentiates the approach followed by the Second Circuit in United States v. Lustman, 2 Cir. 1958, 258 F.2d 475, cert. denied 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109, where the accused was on bond and assisted by counsel during the period of delay, and the approach taken by the Ninth Circuit in Chauncey v. Second Judicial District Court, 9 Cir. 1973, 474 F.2d 1238, 1239, where the accused had no counsel and was incorrectly advised by Arizona prison authorities as to the county in Nevada where charges were pending against him.

The record in the instant case gives no indication that Prince received the effective assistance of counsel in his attempts to deal with the Alabama authorities. He was advised by a Berkeley, California, attorney, whose assistance he sought unsuccessfully, that he should attempt to have the Alabama charges dismissed rather than attempt to litigate the constitutional issue (apparently referring to the speedy trial issue). Prince was incarcerated across the continent from the jurisdiction where the charges were pending and lacked the effective assistance of counsel. This is not to intimate that Prince received no benefit from the Hastings law student who assisted him in the California district court. Rather, we are concerned here with Prince's dealings with Alabama authorities charged with the responsibility for his prosecution.

of his speedy trial right, to the Solicitor in Jefferson County. This motion, which Prince apparently intended be filed with the circuit court, certainly placed the prosecution on notice that Prince was preserving his speedy trial claim. Strunk v. United States, supra. The fact that the notice arrived in the form of a motion to dismiss is of no consequence. Prince effectively asserted his speedy trial right at least as early as July 1968.

We are not convinced, moreover, that Alabama authorities were not placed on notice that Prince wanted speedy disposition of pending charges as early as October 1963. At that time Prince asserted that the outstanding charges against him would adversely affect his eligibility for rehabilitation programs under the California Department of Corrections and requested that the charges be dropped. He ended his letter by stating: "This request will be deeply appreciated and relieve my many worries for the future."

Prince, prophetically, was complaining of precisely the type of prejudice peculiar to convicts against whom charges are outstanding in another jurisdiction and noted by the Supreme Court in its decision in Smith v. Hooey, supra, 393 U.S. at 378–379, 89 S.Ct. at 577, 21 L.Ed.2d at 611–612.[10] If the speedy trial right is designed, at least in part, to protect certain interests of the accused, and if the accused asserts to the prosecuting authorities that delay in resolution of the charges pending against him is prejudicing those very interests, this may very well in itself be sufficient to put the prosecution on notice that the accused desires a speedy resolution of the charges pending against him. It would seem unduly harsh to require that an unsophisticated accused, proceeding *pro se*, invoke the talismanic phrase "speedy trial" before he can claim to have asserted his right. Especially is

10. See the discussion of prejudice at note 15 and accompanying text, infra. See also Effective Guaranty, supra, note 4, 77 Yale L.J. at 767, and Lagging Right, supra, note 2, 51 Va.L.Rev. at 1607.

this so when the prosecution continues at all times to bear the responsibility for securing a prompt trial.

We conclude, therefore, that Prince effectively notified Alabama authorities, at the earliest by October 1963 and at the latest by July 1968, of his desire for resolution of the charges pending against him. Yet he was not returned to Alabama for trial until February 1971.

C. Reasons for the Delay

The Alabama Court of Criminal Appeals and the district court below found two basic reasons for the delay in bringing Prince to trial during the period of his incarceration in the California prisons. First, they opined that Prince was not "available" to Alabama authorities until his release by the State of California in 1971. Second, they found that Prince had himself caused postponement of his release from CDC by his failure to accept the conditions of his parole, e. g. extradition to Alabama for trial. The courts further found that Prince had refused to waive extradition to Alabama throughout the period 1964–70.

Regarding Prince's availability to Alabama officials, the Court of Criminal Appeals ruled:

> [F]rom 1962 through 1971, the State of Alabama had made some thirteen separate requests of California, seeking information as to the early release of the appellant to the State of Alabama for trial. Each of these indicated that the State of Alabama would forward the necessary extradition papers in the event that the appellant would not waive same, and such extradition would be at the expense of the State of Alabama. * * * [T]he State of California at no time had indicated that the appellant would be made available for trial in Alabama prior to releasing the appellant in 1971.
>
> * * * * * * * * * *

> [I]t is clear that the State of Alabama . . . had no opportunity to exercise its jurisdiction over the appellant . . . until his return to the State of Alabama in 1971; . . .. 279 So.2d at 544–545.

The Supreme Court in Smith v. Hooey, supra, has made it abundantly clear that the concept of "availability" embodied in the above-quoted portion of the Alabama court's opinion is an erroneous one. Quoting from its previous term's decision in Barber v. Page, 1968, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255, the Court ruled in *Smith*:

> "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.
>
> * * * * * * * * * *
>
> "By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the . . . court for trial." Id., 393 U.S. at 382–383, 89 S.Ct. at 579, 21 L.Ed.2d at 613–614.

We find no evidence in the record to indicate that the State of Alabama made any such "good-faith" effort to secure Prince's presence for trial prior to the date of his scheduled release from the CDC. The Alabama Court of Criminal Appeals emphasized that the State had written California authorities on thirteen separate occasions during the period of Prince's incarceration there seeking information as to Prince's "availability" for extradition, and that California's response was uniformly: "We will let you know when he is available."

[13] This characterization misses the point underscored by the Court in Smith v. Hooey, supra. Under *Smith* and subsequent cases [11] Alabama had a constitutionally imposed duty to

11. See the cases cited in note 4, supra.

take affirmative action to secure Prince's return for trial. Mere inquiries about release and availability are not compliance with this duty. Attempts at extradition[12] or the issuance of a writ of habeas corpus *ad prosequendum* by the Alabama courts would have been in the nature of such affirmative action.[13] The record reveals no such attempts of this nature.

The State argued on appeal that such attempts, if undertaken, would have been futile. Again, under Smith v. Hooey, supra, this is not enough. There, the Court, quoting Judge Aldrich of the First Circuit, noted: "'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.'" Id. at 382, 89 S.Ct. at 579, 21 L.Ed.2d at 614.

Finally, we find that the Alabama appellate court and the district court were wrong as a matter of law in concluding that Alabama had discharged its constitutional duty to attempt to secure Prince's presence for trial.

[14] The second ground relied upon by these courts below as a basis for finding that the delay in procuring Prince for trial was not attributable to the State of Alabama was the finding that Prince had refused during the period of his incarceration to accept parole subject to extradition to Alabama and had refused to waive extradition to Alabama. Our independent examination of the record below discloses only one such instance of refusal, occurring in December 1970. At this time Prince refused to accept parole subject to return to the CDC upon his ultimate release by Alabama authorities. This resulted in a two-month delay in Alabama's gaining custody of Prince. It is clear that Prince's motive in refusing parole at this juncture was not to frustrate his return to Alabama. He sought merely to ensure that he would not have to be returned to the State of California upon disposition of matters in Alabama. In fact, Prince waived extradition to Alabama once the matter of his return to California was resolved to his satisfaction.

[15] The only possible alternative basis for a conclusion that Prince followed a course of refusal of extradition or parole is a comment made by Prince in a letter sent to an attorney in California whose assistance he sought. The passage from which the comment was taken, as quoted by the Alabama Court of Criminal Appeals, 279 So.2d at 548 n. 10, reads in pertinent part:

> I never been before a judge, where any question of extradition was spoken of. And for that matter I have never signed any papers as to my agreeing upon going back to Alabama. The only times the questions of this nature were spoken to me was at my parole hearing, with the members of the parole board. At that time I made the statement that I would die before I be sent back to Alabama.

In our opinion, this statement does not "fairly support" the Alabama court's finding that: "On each occasion that appellant appeared before the California Parole Board . . . he advised the California authorities that he would not waive extradition to Alabama." 279 So.2d at 544 n.6.

Preliminarily, a reading of the complete letter from which the excerpt quoted above comes reveals Prince's conviction

12. The Alabama Code specifically provides for extradition, at the initiation of the Governor, of individuals located outside the jurisdiction of the Alabama courts. Code of Ala., Title 15, Sec. 70 et seq. (1959). Prince, in fact, wrote a letter to the Governor, and, although he did not request that he be extradited, it is reasonable to expect that some further inquiry into the possible need for extradition might have been forthcoming. There was no follow-up other than forwarding a copy of the letter to the solicitor in Jefferson County, text, supra.

13. It will be recalled that Prince's motion to dismiss the information, sent to the Jefferson County solicitor, was never brought to the attention of the Circuit Court in Jefferson County. Nevertheless, Prince filed a similar motion in the Alabama Supreme Court, again claiming denial of the right to a speedy trial. While the record does not disclose precisely the outcome of this motion, which was also titled a "Petition for Writ of Mandamus," for aught that appears it was denied without comment.

that, as a matter of law, Alabama had lost jurisdiction to try his case. Prince states:

> Alabama was supposed to sentence me and then [sic] turn me back over to the state of california to be sentenced. I should be doing a sentence for Alabama if I had been convicted there with a hold from California.
>
> Alabama had original jurisdiction. Under these laws I have been in prison more than 5 years; in calif. therefore I believe Alabama has lost jurisdiction to try me or convict me. I would like very much to know what you think.

Viewed in context, Prince's comment that he would die before being returned to Alabama, assuming that the statement indicates unwillingness to return to Alabama,[14] could simply be a statement of his determination to assert his legal right not to be returned to Alabama for trial. This ambiguity robs the statement of whatever slender probative value it may have had.

[16, 17] In addition, the State had the burden of showing that Prince had, by his actions, actually frustrated his return to Alabama for trial. Mere citation of this comment from Prince's letter, without more, is clearly insufficient to discharge that burden. Accordingly, we rule that the Alabama court's finding that Prince thwarted attempts to secure his return to the State of Alabama is not in fact "fairly supported" by the record, and is entitled to no weight here. Title 28 U.S.C. Sec. 2254(d)(8).

[18] Our conclusion, then, is that the primary reason for the delay in bringing Prince to trial in Alabama was the failure by Alabama authorities to initiate meaningful efforts to secure this result. We need not speculate as to the possible success of such efforts. State authorities were under a constitutional duty to undertake them. Failure to do so, in the face of Prince's assertion of his speedy trial right, and with the consequent delay in Prince's trial, constituted a deprivation of Prince's right to speedy trial. We so hold.

14. It is not at all clear that this is the intent of the statement. Prince may have been expressing his opinion that, because of the delays that he had experienced in obtaining resolution of matters in Alabama, he would die of old age before he would be returned to Alabama.

D. The Question of Prejudice

[19, 20] While we are not compelled to consider the question of prejudice by reason of our holding in *Hoskins III*, note 4, supra, 485 F.2d 1186, 1192, that prejudice is immaterial where consideration of the other three factors—length of delay, defendant's assertion of his right, and reasons for the delay—coalesce in the defendant's favor, we make the following observations.[15] We begin with the premise that the speedy trial right is designed to protect against two distinct types of prejudice—"prejudice to [the] defendant's defense and prejudice to [the] defendant's person." Lagging Right, supra, note 2, at 1593.

[21] Prejudice to the defendant's defense goes to the reliability and integrity of the fact finding process.[16] Prince claims that his defense has been impaired due to the lapse of time both in the disappearance or death of key alibi witnesses and in the dimming of the memories of those witnesses who were available at trial. Without reaching the merits of this claim—which was not ruled upon by the State court or the court below—we simply note that, under our prior holding in *Hoskins I*, supra, 440 F.2d 69, 72, where the defendant has established a prima facie case of denial of the speedy trial

15. On the arguments for and against requiring a showing of prejudice, see generally Note, Speedy Trial, supra, note 3, 20 Stan.L.Rev. at 493–94; Lagging Right, supra, note 2, 51 Va.L.Rev. at 1592. Guided at this juncture by our holding in *Hoskins III*, we are under no obligation to pursue the matter further.

16. One commentator has observed:

> With the exception of the due process clause, no procedural safeguard in the Bill of Rights designed to ensure the reliability of the guilt-determining process other than the right to a speedy trial requires a defendant to show actual prejudice in order to establish a violation of that safeguard. Note, Speedy Trial, supra, note 3, 20 Stan.L.Rev. at 493–94.

right, the burden is upon the State to show that the defendant has not been prejudiced by the delay.

[22] Prince has a further claim to personal prejudice resulting from the pendency of the Alabama charges against him and the lodging of the detainers with the CDC. Prince had asserted to Jefferson County officials as early as October 1963 that the pendency of the detainer against him was having an adverse effect upon his being considered for the most favorable rehabilitation and parole programs offered by the CDC. Further support for this claim was provided in two letters written to Jefferson County officials by a representative of the "7-Step Foundation," a California organization apparently dedicated to assisting CDC inmates in obtaining and keeping favorable parole and work-release programs. According to the correspondence from "7-Step," Prince had received vocational training as a nurse and had been assured by the State of California that he would be offered a job in one of its mental institutions upon his release from CDC—subject to disposition of the pending Alabama charges. Apparently this opportunity was lost to Prince as a result of Alabama's failure to afford him a speedy trial.

"7-Step" also indicated in its correspondence that Prince's custody status in the CDC was being held at medium security because of the pending detainers and that Prince was therefore ineligible for part-time, work-release programs offered by the CDC. We notice finally the possibility that had Prince been accorded a speedy trial on the Alabama charges, it was at least possible that his sentence might have run in part concurrently with his California sentence. That possibility was forever foreclosed by Alabama's election to postpone prosecution until Prince's release from the CDC.[17]

17. Perhaps the impact of the delay and its attendant frustration upon Prince is best described in his own words. The following is an excerpt from a letter addressed to the federal district judge in whose court in California Prince was pressing for habeas corpus relief shortly before his release to Alabama authorities:

Dear Sir:

I am writing you because I am very concerned and somewhat disappointed and almost discouraged with the people who enforce the constitution in this country. For eight long years I have been trying to get to trial on the charges that are pending on me in Alabama. I have exhausted all State remedies in the State of Alabama and the State of California. I was recently given a parole (to hold) after eight years in the penitentiary. I cannot make a positive parole plan until you act on this case, I cannot even go on the Work Furlough program, no one wants to give me a job because they cannot know whether I will be sent back to Alabama or remain in California on parole. I feel that the courts have been playing a game with me for over eight years and I can't help but feeling that this Federal court is playing the same game. Somehow I am under the impression that the constitution means nothing any more, and if I tell you that I have no bitterness for the way the courts have treated me for the past eight years, I would be lying. I can't help from wondering whether or not the Constitution applies to the "have nots", or if a gun and revolution is really the answer, for the "have nots" to benefit by the law, be recognized as a man, decide their own destiny and cast their own shadow. In my heart I pray that this is not the answer, because I think our country has seen enough blood, but if there is no other way, I too will say "on with the revolution." I have seen poor people, black, white, mexican and all other ethnic groups, run through a court room like clothing run through a washing machine, denied their constitutional rights, and it seems that no one cares, not even the people who enforce the constitution of our land. I pray to God that some Judge will understand that which is happening today and do something about the situation. My final prayer is: rule one way or the other, deny me, or give me my constitutional rights.

Conclusion

[23] To summarize, we find that: (i) the appellant effectively asserted his speedy trial right, at least as early as July 1968; (ii) that an unreasonable period of 2½ years delay followed this assertion before the appellant was taken into custody by Alabama officials; (iii) that the delay is attributable solely to the failure of Alabama officials to make a "diligent, good-faith effort" to secure the appellant's presence for trial prior to his release by California authorities, and (iv) that Prince has been prejudiced by the delay. For these reasons we hold that the appellant was denied his Sixth

Amendment right to a speedy trial, enforceable upon Alabama through the Due Process Clause of the Fourteenth Amendment. The remedy must be his release from State custody on the robbery charges on which he is now imprisoned.

Accordingly, the judgment of the district court is reversed, and the case remanded with directions that the writ of habeas corpus issue forthwith directing Prince's discharge from custody.

Reversed and remanded.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-3108

D. C. Docket No. CA-73A-601

THOMAS R. PRINCE,

Petitioner-Appellant,

versus

STATE OF ALABAMA,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Before GODBOLD, SIMPSON and INGRAHAM, Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.

January 31, 1975

Issued as Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
March 13, 1975

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

RE: **No. 73-3108—Prince vs. State of Alabama**

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
CLERK
By ANNE G. PARENT
Deputy Clerk

cc: Mr. Robert R. Bryan
Mr. Thomas R. Prince
Hon. William J. Baxley
Messrs. Don C. Dickert
Joseph G. L. Marston, III

APPENDIX "C"

PRINCE V. BAILEY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

NO. C. A. 71-1003

EXAMINATION, REPORT AND
RECOMMENDATION TO THE
DISTRICT JUDGE AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHER DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS R. PRINCE,)
—Vs—) Petitioner.)
MELVIN BAILEY, Sheriff) No. CA 71-1003
of Jefferson County, Alabama,)
Respondent.)

EXAMINATION, REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT JUDGE

This case has been referred to the United States Magistrate for examination, report and recommendation. The following is submitted:

Thomas R. Prince by and through his Attorney, Robert R. Bryan, has filed in this Court, his petition for habeas corpus. A response to the show cause order has been filed on behalf of the Respondent by the Attorney General of the State of Alabama. Petitioner contends that he is entitled to a writ of habeas corpus granted by this Court because the State of Alabama has denied him his constitutional right to a speedy trial.

The petition for habeas corpus, the response filed on behalf of the Respondent and the exhibits thereto, reflect the following:

On May 7, 1962, two robberies occurred in the City of Birmingham. At approximately 7:25 p.m. on May 7, 1962, the A & P Tea Company at 728 - 18th Street, North, Birmingham, Alabama was robbed. The robber, armed with a sawed-off shotgun, obtained a sum of money at gun point and fired at the store manager. On the same day, May 7, 1962, George Henry Thornton was held up with a sawed-off shotgun and was robbed of a sum of money. Petitioner was identified by two witnesses at the A & P Store and by George Henry Thornton, the victim of the second robbery. Shortly after

these offenses were committed, Petitioner left Birmingham, Alabama and travelled to Los Angeles, California.

On the 29th day of June, 1962, Petitioner was arrested in California on a charge of grand theft and armed robbery. On the 11th day of —2— December, 1962, Petitioner was sentenced in the California State Court at Los Angeles, California for the offense of armed robbery to a sentence of five years to life.

On the 7th day of May, 1962, Petitioner was indicted by the Circuit Court of Jefferson County, Alabama in two cases for the offense of robbery. At this time Petitioner was in the custody of California authorities. On July 12, 1962, the Los Angeles Sheriff's office was notified by prosecuting officials in Jefferson County that Petitioner was wanted in Jefferson County on a charge of robbery. By letter dated July 12, 1962, a detainer was filed with the Sheriff's Department of Los Angeles, California by the prosecuting officials of the Circuit Court of Jefferson County, Alabama.

In 1963, Petitioner was reindicted in the Circuit Court of Jefferson County. The purpose of the reindictment was merely to more particularly identify Petitioner; the charges contained in the new indictment were identical to those contained in the original indictments. During all times Petitioner was confined in the California State Courts, a detainer was filed against him as a result of the two charges discussed above by the prosecuting officials in Jefferson County, Alabama.

On February 22, 1971, Petitioner was returned to the State of Alabama based on the detainer referred to above for the purpose of standing trial on the charges pending in the Circuit Court of Jefferson County, Alabama. The circumstances of Petitioner's return will be discussed in a later portion of this report. After his return to Alabama, Petitioner filed a petition for habeas corpus in the Circuit Court of Jef-

ferson County and a motion to dismiss the pending indictments. Petitioner's contention was identical to his State habeas corpus petition and in his motion to dismiss - - - that the State of Alabama had unconstitutionally deprived Petitioner of his right to a speedy trial. On September 8, 1971, an evidentiary hearing was held before the Honorable Elias C. Watson, Jr., Circuit Judge. The transcript of this evidentiary hearing consists of 317 pages. Numerous exhibits were introduced at the evidentiary hearing.

—3—

In Petitioner's direct testimony, Petitioner claimed that beginning in 1962 and continuing throughout Petitioner's incarceration in the State of California, he made constant demands that he be brought to trial on the Alabama charges or that they be dismissed. Petitioner's testimony was to the effect that his efforts to bring about a speedy trial of the Alabama charges culminated in a petition to dismiss the Alabama cases which was filed on the 9th day of July, 1968. The written exhibits introduced at the hearing before Judge Watson both on behalf of the Petitioner and the State of Alabama are not consistent with Petitioner's verbal testimony. Prior to July of 1968, Petitioner made numerous written requests that the charges pending against him in Alabama be dismissed. None of these written communications requested or demanded a trial. There is an important distinction in a request that charges be dismissed and a demand that a defendant be brought to trial. Every defendant who has charges pending against him would quite naturally desire those charges to be dismissed. It does not necessarily follow that every defendant who has charges pending against him, desires to be brought to trial and face the possibility of conviction and sentence, particularly if a defendant, such as the Petitioner, is already serving a substantial prison sentence. The Circuit Court of Jefferson County concluded after the evidentiary hearing had been completed and the evidence clearly

supports this finding that prior to July 1968, Petitioner made no request or demand for a trial; Petitioner merely, prior to the aforesaid date, requested that the State of Alabama, in the interest of society and the Petitioner, dismiss the pending charges.

The issue before this Court is whether or not action by the State of Alabama or inaction by the State of Alabama, under the circumstances of this case, constitutes a deprivation of Petitioner's right to a speedy trial as guaranteed by the 6th Amendment and the 14th Amendment of the Constitution of the United States.

Prior to 1967, there was uncertainty in the law as to whether the 6th Amendment to the Constitution of the United States and the Due —4— Process clause of the 14th Amendment constituted a Federal Constitutional mandate to the States to afford a defendant in State Court with a speedy trial. This uncertainty was resolved in *Klopfer vs. N. Car.*, 386 U.S. 213. The Supreme Court in *Klopfer*, Supra. treated the history of the right to a speedy trial and the Court concluded that the right to a speedy trial was guaranteed by the Constitution of the United States and was obligatory on the States. Whether this obligation is created by the 6th Amendment or by the Due Process clause of the 14th Amendment, the conclusion is now clear that a State defendant is entitled to the Federal Constitutional protection to the end that such a defendant be afforded a speedy trial. The Supreme Court in *Klopfer*, Supra. was concerned with a defendant charged in the State Court of North Carolina who had been free on bond for several years and who had repeatedly demanded that he be brought to trial without success.

The Supreme Court of the United States again gave consideration to the obligation of a State to provide a defendant with a speedy trial in *Smith vs. Hooey*, 393 U.S. 374. The speedy trial doctrine in *Smith vs. Hooey*, Supra. was consid-

ered in a situation where a person under a State criminal charge is serving a prison sentence imposed by another jurisdiction. Smith was under indictment in Harris County, Texas. At the time the Texas indictment was returned, Smith was a Federal prisoner. Smith, on frequent occasions, requested that the Texas authorities afford him a speed trial. Smith, by way of mandamus, sought dismissal of the State charges in the Texas Courts on the ground that he had been denied a speedy trial. The Supreme Court granted certiorari from the decision of the Texas Supreme Court denying relief. The Supreme Court concluded in *Smith vs. Hooey*, Supra. that upon Smith's demand, Texas had a Constitutional duty to make a diligent good faith effort to bring him before the apropriate Texas Court for trial. The Supreme Court pointed out that the possibility of success or failure in the ability of a State to return a defendant from another jurisdiction is immaterial on the Constitutional issue. "The possibility of a refusal is not the equivalent of —5— of asking and receiving a rebuff." *(Smith vs. Hooey*, Supra., 382)

It is well to note and keep in mind the effect of the Supreme Court's decision in *Smith vs. Hooey*, Supra. The Order of the Supreme Court of Texas was set aside and the case remanded for further proceedings consistent with the Supreme Court's opinion. Mr. Justice Black, in a special concurring opinion, said "He would make it absolutely clear to the Supreme Court of Texas that so far as the Federal Constitutional question is concerned, judgment is set aside only for the purpose of giving the Petitioner a trial, and that if a trial is given the case should not be dismissed." It is therefore apparent that in a fact situation parallel to *Smith vs. Hooey*, Supra., the State is required to provide a trial. The State is not necessarily in these circumstances, required to dismiss the charges.

The circumstances which require State action in accord-

ance with the doctrine of *Smith vs. Hooey*, Supra. have been established in the Fifth Circuit by the decision of the United States Court of Appeals for the Fifth Circuit in *May vs. Georgia*, 409 F.2d 203, 5th Cir. (1969). In this case, Judge Godbold, speaking for the Court said "*Hooey* controls our decision. There is a duty on the State of Georgia to make a diligent good faith effort to bring appellant before the appropriate State Court for trial, *provided he has made a sufficient demand within the meaning of Hooey for a trial.*" (Emphasis supplied) As pointed out hereinabove, during the period 1962 to 1968, Petitioner never requested or demanded a speedy trial. Petitioner never stated in words or writing to Court officials in Alabama that he desired his guilt or innocence to be established by a trial, that if guilty, he desired to be sentenced and if innocent, he desired vindication. On the contrary, he merely requested that the charges be dismissed. One of the attorneys contacted by Petitioner during the time he was in confinement in California was Lois K. Thomas, Berkley, California. On December 30, 1967 in response to an inquiry from Petitioner, Attorney Thomas advised Petitioner as follows: "California does not have to send you to Alabama for trial unless Alabama asks for this to be done. If you, yourself, also had asked Alabama to try you back in 1962, it would strengthen —6— your case. But it is much better to get charges dropped if you can, than to fight a Constitutional case through several Courts even if you are very likely to win." (Defendant's Exhibit 6) This exhibit is referred to to illustrate Petitioner's frame of mind and information furnished by Petitioner to his own attorney. The significance of this information is that during the period from 1962 to 1968, Petitioner was approaching the problem concerning his Alabama cases on the basis of his desire to secure a dismissal rather than demanding and requesting that he be brought to trial.

In addition to the total absence of a request or a demand for a trial, Petitioner by his own action, and independent decision, contributed to the delay in his being returned to the State of Alabama to answer the charges against him. On July 25, 1970, the Adult Authority Board of the State of California determined that parole should be granted to Petitioner, effective December 14, 1970, "To go to Hold." (Defense exhibits 54 & 55) On or about December 14, 1970, Petitioner refused to sign the conditions of his parole. Prosecuting officials were advised of this fact by a telegram from the California State Prison dated December 16, 1970. Petitioner's refusal to sign the conditions of his parole resulted in further delay in the release of Petitioner from California authorities to Alabama authorities for the purpose of disposal of the charges pending against Petitioner in Alabama. (State Exhibit 40) On October 14 ,1970, Petitioner signed an acknowledgement of his willingness to accept parole to the detainer placed by Alabama authorities and a waiver of extradition to the State of Alabama.

In July of 1968, Petitioner submitted to the prosecuting officials of Jefferson County, Alabama, a pleading styled "Motion to Set Aside the Information or to Dismiss the Information." This pleading was never filed in the Circuit Court of Jefferson County, Alabama and therefore was never acted upon by that Court. This was not the fault of Petitioner. In this pleading Petitioner claimed that he had been denied the right to a speedy trial and requested dismissal of the charges. Nowhere in —7— this pleading does Petitioner request a trial or claim that he had ever requested or demanded that he be tried on the Alabama charges. Even if the pleading above referred to could be considered as a demand for a speedy trial, Petitioner by his own action in refusing to consent to be parolled to the Hold, contributed to the delay in his being returned to the State of Alabama for trial of the cases pending against him.

While Petitioner was confined in the California Prison System, he suffered two nervous breakdowns. As a result of his illness, he was confined in the California Medical Facility at Vacaville, California. Based upon Petitioner's testimony at the evidentiary hearing, it appears that Petitioner was confined in the Medical Facility at Vacaville, California from 1962 until on or about June of 1967. During some or all of the time that Petitioner was confined in the Medical Facility at Vacaville, California, he testified that he was under treatment for a nervous breakdown and was receiving medication in the nature of a powerful sedative. It was Petitioner's further testimony that being under sedation at the Vacaville Medical Facility, his memory was dim as to what he did or did not do in respect to the Alabama charges during that period of time. A reasonable inference may be drawn from Petitioner's testimony that during the period of his confinement in California at the Vacaville Medical Facility, he would not have been available for trial because of his physical and mental condition.

It is the Magistrate's conclusion that Petitioner's failure to request or demand a speedy trial while he was confined in the State of California, removes him from the requirements of *Smith vs. Hooey*, Supra. Petitioner's failure to request or demand a speedy trial and his decision to obstruct and delay his return to the State of Alabama constitute, if not a waiver, a conscious and knowing decision not to invoke the Constitutional requirement of a speedy trial.

Under the facts and circumstances of this case as developed by the Circuit Court of Jefferson County in a fair and complete evidentiary hearing, the Magistrate concludes that Petitioner has not been refused —8— a speedy trial as that Constitutional guarantee is defined in *Smith vs. Hooey*, Supra. It is therefore recommended that the petition for habeas

corpus be denied. The facts have been completely developed in the forementioned evidentiary hearing. There is no requirement for any further evidentiary hearing in this Court.

Because of the importance of this question, it is further recommended that in the event Petitioner should elect to appeal from this Court's decision, that the Court issue a certificate of probable couse.

DATED this 12th day of January, 1972.

R. MACEY TAYLOR
UNITED STATES MAGISTRATE

—9—

ORDER

The Court has considered the pleadings filed by Petitioner in this case and the report and recommendation of the United States Magistrate. The Magistrate's recommendations are hereby adopted and approved.

For the reasons stated in the Magistrate's report, it is hereby ORDERED that the petition for habeas corpus filed by Thomas R. Prince, be and the same hereby is DENIED.

For the reasons stated in the Magistrate's report, in the event Petitioner desires to effect an appeal from this decision, the Court hereby certifies that probable cause exists for such an appeal.

The Clerk is directed to furnish Petitioner with a copy of the Magistrate's report and this Order by mailing a copy to his attorney of record, the Honorable Robert R. Bryan. The Clerk is further directed to mail a copy of the Magistrate's report and this Order to the District Attorney, Tenth Judicial Circuit, Jefferson County Courthouse, Birmingham, Alabama and to the Honorable William Baxley, Attorney General, State of Alabama.

DONE this _____ day of January, 1972.

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

PRINCE V STATE

COURT OF CRIMINAL APPEALS
OF ALABAMA

6 DIV. 392

50 ALA. APP. 368

279 S.2d 539

Thomas R. PRINCE

v.

STATE.

6 Div. 392.

Court of Criminal Appeals of Alabama.

March 27, 1973.

Rehearing Denied May 8, 1973.

The Jefferson County Circuit Court, J. Louis Wilkinson, Special Judge, found defendant guilty of robbery, and he appealed. The Court of Criminal Appeals, Tyson J., held that since, from the period indictment was returned to 1962 until the mailing of his "demand" to the district attorney in Birmingham in 1968, defendant's efforts at being brought to trial were largely frivolous, and since, on the other hand, from 1962 through 1971 when defendant was finally brought to trial, the State of Alabama made numerous separate requests of California, seeking information as to the early release of defendant to the State of Alabama for trial, it was clear that Alabama had no opportunity to exercise its jurisdiction over defendant until his return to Alabama in 1971 and, therefore, defendant was not denied a speedy trial in respect to the period of his incarceration in California prior to his return to Alabama.

Affirmed.

Cates, P. J., concurred specially with opinion.

DeCarlo, J., recused himself.

Certiorari denied. 291 Ala. —, 279 So. 2d 549.

1. Criminal Law—573

Since, from time indictment was returned in 1962 until mailing of his "demand" to Birmingham district attorney in 1968, defendant's efforts at being brought to trial were largely frivolous, whereas Alabama, from 1962 up through 1971 when defendant was finally tried, made numerous separate

requests of California, seeking information as to an early release of defendant to Alabama for trial, it was clear that Alabama had no opportunity to exercise its jurisdiction over defendant until his return to Alabama in 1971 and, therefore, defendant was not denied a speedy trial in respect to the period of his incarceration in California. U.S.C.A. Const. Amends. 6, 14.

2. Criminal Law—586

Continuances were properly a matter within the discretionof the trial court, and the court did not abuse its discretion in granting the continuances, both to defedant and to the State, despite fact that defendant had filed a motion for a speedy trial after the termination of his California incarceration and his return to Alabama. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law—339

Pretrial motion to suppress, predicated on claim that the exhibition of photographs of defendant to cashier and manager of robbed store was "impermissibly suggestive," was

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correctly denied by the trial court, as the "totality of circumstances," including fact that both the cashier and manager made an in-court identification of defendant at his trial which took place a number of years after the robbery, failed to indicate that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misideification.

4. Criminal Law—572

Evidence was sufficient to sustain lefendant's conviction of robbery as against his defense of alibi, predicated on claim that he was not physically present in the State at the time of the robbery.

5. Criminal Law—753.2(1), 807(1), 829(1), 830

Requested charges not given by the trial court were prop-

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erly refused as being either affirmative in nature, incorrect statements of the applicable law, argumentative under the evidence, or fully and substantially covered in other charges given. Code of Ala., Tit. 7, § 273.

Robert Bryan, Birmingham, for allepllant.

A state's delay of more than eight years before bringing an accused to trial results in a violation of the Constitutional right to a speedy trial and due process of law, where the delay resulted in prejudice to the accused, and where the state can suggest no tenable reason for deferring the trial in face of the accused's diligent and repeated efforts to have the pending charges dismissed and for said constitutional deprivation while he was serving a prison sentence in another jurisdiction. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101; Clark v. Oliver, D.C., 346 F.Supp. 1345 (1972); Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 25 L.Ed.2d 26 (1970); Johnson v. Cerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1966); May v. Georgia, 5th Cir., 409 F.2d 203 (1969); Pitts v. State of North Carolina, 395 F.2d 182 (4th Cir. 1968); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Taylor v. United States, 99 U.S.App.D.C. 183, 238 F.2d 259, 261 (1956); United States v. Banks, 4th Cir., 370 F.2d 141 (1966).

James J. Jenkins, Sp. Asst. Atty. Gen. Tuscaloosa, for the State.

An accused's right to a speedy trial is a constitutional right but inorder to obtain the benefit of it, it must be affirmatively exercised. Autrey v. State, 44 Ala|App.53, 202 So.2d 88. A defendant cannot exploit a delay which is attributable primarily to his own acts or to which he has consented. United States v. Lustman, 258 F.2d 475, (2d Cir. 1958), Id., 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109; Pollard v. United

States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393; United States v. Provoo, 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761. Even if the delay is unreasonable, where the appellant fails to make a demand for an early trial, he waives his right to challenge the legality of the government's delay. Harlow v. United States (5th Cir. 1962), 301 F.2d 361. Id., 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56. The requirement of a demand, leading to a trial on the merits when the defendant has not complained of the delay, stresses that the right to a speedy trial is not designed as a sword for the defendant's escape, but rather as a shield for his protection. United States v. Lustman, 258 F.2d 475 (2d Cir.), Id., 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958).

TYSON, Judge.

The appellant was indicted by the Grand Jury of Jefferson County, Alabama, for robbery on May 10, 1962. This first indictment for the robbery of an "A & P" store resulted in appellant's conviction and sentence of twenty years, culminating in this appeal. A second indictment was returned on December 5, 1963, also for robbery. Prior to these indictments, appellant apparently left the State of Alabama and

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was arrested, convicted, sentenced, and imprisoned in California on November 27, 1962, for first degree robbery and grand theft.

Appellant presents to this Court the issue involving whether he was denied his constitutional right under the Sixth and Fourteenth Amendments of the United States Constitution to a speedy trial in the State of Alabama. Appellant's contention essentially is, upon his incarceration in California, that he demanded of the State of Alabama a trial upon the charges on which he was indicted in this State, and did not receive such a trial until September 8, 1971. After an extensive review, the record indicates that appellant, up

until July 9, 1968, made the following requests; first, on October 28, 1963, appellant corresponded with the district attorney for the Tenth Judicial Circuit, requesting the charges against him be dropped. This correspondence was repeated on November 23, 1966. During the period prior to July 9, 1968, appellant filed various petitions in California State courts and Federal courts. However, none of these appear to have been filed during this period in the State of Alabama demanding trial.

On July 9, 1968, appellant sent to the district attorney in Birmingham, to be filed in the Circuit Court, a request for trial upon the charges presently pending against him. This request was never filed nor answered. During this period of time, appellant was eligible for parole in California, and had appeared before the parole board beginning in 1964. However, appellant would not accept the condition of the parole, i.e., releasing him to the State of Alabama for trial, but refused extradition until 1971[1] Appellant also during this period refused to waive extradition, and as a consequence remained in confinement until his actual parole release date to Alabama.[2]

The State of Alabama, beginning July 12, 1962, requested, of California, the appellant for trial, and on this date filed detainers against him. Continuously from July 12, 1962. until February 1, 1971, the State of Alabama informed California that when appellant was available, Alabama desired to return appellant to this State for trial.[3]

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[1] See Title 10, Section 1389 et seq., California Penal Codes Annotated —Agreement on Detainers.

[2] Cf. Nelson v. George (1970), 399 U.S. 224, 90 S.Ct. 1963, 26 L.Ed.2d 578.

[3] Alabama made thirteen separate requests of the State of California, advising California that appellant, when made available by California, would be extradicted to Alabama, at Alabama's expense, for trial, and to advise of his release date See also Footnote 8.

The State of California never notified Alabama that appellant would be available, or released, until he was paroled on February 22, 1971.[4] The Chief Executive for the State of Alabama issued a requisition warrant to the State of California upon which the Governor of California issued a rendition warrant and released the appellant to Alabama for trial.

Seven months later, trial began. During the period, appellant requested several continuances, but his cases were placed upon the docket for trial immediately upon his return. The first of these was reached on September 9, 1971.

Appellant had also filed a second motion for a speedy trial upon his return to Alabama, and, through counsel, had filed motions to suppress and exclude the State's evidence.

At trial, the State of Alabama presented the testimony of three witnesses, Mrs. Jean McKinney, the cashier at the A & P store, Mr. Joseph P. Potter, the manager of the A & P store, and Mr. Ollie V. Vance, a thirty-one year police detective veteran, who has now retired, and who conducted the

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investigation of the robbery, which occurred at the A & P store in Birmingham on May 7, 1962. Both Mrs. McKinney and Mr. Potter made independent in-court identification of the appellant, and further described that on the night of May 7, 1962, the appellant had entered the store shortly before 7:00 p.m. and approached the cash register where Mrs. McKinney was on duty. Mrs. McKinney stated:

> "Well, this colored man came into my line and made a small purchase. I don't remember whether it was cigarettes or—just one item, I think, then after he made the purchase he handed me a piece of paper.

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[4] Apparently, due to appellant's refusal of extradition, California elected to require appellant to complete his sentence before releasing him to Alabama. Clearly, the appellant could not both demand trial in Alabama on the one hand, and refuse to appear on tthe other. See also Footnote 9.

I took the paper and read it and he had wrote on it for me to open the register and give him the money or he would shoot me and I looked down; he had a sack laying on my counter. I told him I couldn't open the register and he looked at me again and told me to open the register, said I mean it, and I told him again I couldn't open the register.

"When I said that, he hit the no sale button. I saw his hand coming toward the money and when I saw that I pushed the drawer as if to close it and run; and he missed Mr. Potter by maybe—"

Mrs. McKinney's testimony was verified by the store manager, who also testified that, after the monies were placed in a paper bag, and as the appellant was backing out of the store the following:

"A And I rushed to the front I thought maybe somebody was shoplifting. I didn't know what was taking place and she was squatting down in front of the checking counter, on the front side of it, just hollering Mr. Potter, Mr. Potter, and I went up there I saw this colored man backing out the door and he had a large paper bag, we call it a mealbag, which is twelve-two pound bags of meal, we call the bags a slip, a heavy paste-board paper bag, and he was backing out the door, the door right in front of me right down the counter.

"I didn't know what had happened. I just said, come here, boy. When I did, he just made a lunge with the paper bag and I throwed my head behind the cigarette rack, happened to see something, it happened so quick, the gun went off and shot the cigarettes about six inches from where I was standing, went through the rack, through the sign in the middle of the counter and on into the back wall."

Detective Vance testified that in addition to his investigation on the evening of May 7, 1962, wherein each of the witnesses had described in general terms the party who performed the robbery, the following morning he returned to the store with seven or eight photographs of different persons. Detective Vance stated that both Mrs. McKinney and Mr. Potter each, separately and without consulting the other, selected the photograph of the appellant.

The appellant had presented evidence in his behalf by his brother, James Prince, and his sister, Blanche Agee, who both testified that their brother had left Birmingham during the Spring of 1962, sometime prior to Easter, and that they had corresponded with him from California. Also a photograph of the appellant, bearing the date of December 15, 1961, was placed in evidence, which showed the appellant with a mustache. Their testimony was also corroborated by another brother, Edward Prince.

The able defense counsel had his law clerk, one Timothy Lee Dillard, testify to the effect that he had talked with the State's witnesses in the process of assisting in the preparation of the case for trial, and verified that certain discrepancies existed in each of the State's witnesses' testimony, such as the height of the subject, that "all black people look alike," and that there had been a lineup where they first saw appellant (Mr. Potter), before selecting appellant from "mug shots."

Appellant's motions to exclude and suppress the state's evidence were overruled.

I

Recently, the United States Supreme Court, in Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26, in disposing of the contentions of the State of Florida, indicated:

"Florida argues that the right of the petitioner under the Federal Constitution did not arise until this Court's decision in Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), and that not until Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969), was there a constitutional requirement that the State press for trial of a defendant in custody in another jurisdiction.

"As noted by the Court in Smith v. Hooey, the holding of the *Klopfer* case was that 'the Fourteenth Amendment. [applying] the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.'' 393 U.S. at 374-375, 89 S.Ct. at 575.

"From this the Court went on to hold that on demand a State had a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial. . . ."

More recently, in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182,, 33 L.Ed.2d 101, the Supreme Court, in discussing the so-called "demand waiver rule," pointed out:

"In excepting the right to a speedy trial from the rule of waiver we have applied to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right. But it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself. Moreover, a

defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety.

"The nature of the speedy-trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

"It is also noteworthy that such a rigid view of the demand rule places defense counsel in a awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client's right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time. Since under the demand-waiver rule no time runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus, if the first demand is made three months after arrest in a jurisdiction which prescribes a six months rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances. The result in practice is likely to be either an automatic, pro forma demand made immediately after

appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.

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"We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

"In ruling that a defendant has some responsibility to assert a speedy-trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such cases have involved rights

which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self incrimination, and to have the assistance of counsel. We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under stardard waiver doctrine, the demand rule aside.

"We, therefore, reject both of the inflexible approaches—the fixed time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.

"A balancing test necessarily compels courts to approach speedy-trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, th edefendant's assertion of his right, and prejudice to the defendant."

[1] Applying the foregoing standards to the facts presented in the record in the case at bar, we find that from the period from 1962 until the mailing of his "demand" to the

district attorney in Birmingham in 1968, the appellant's efforts were largely frivolous, being in the nature of the letters seeking dismissal of the charges rather than a good faith demand of trial to vindicate his position. Also equally sufficient is the fact that from 1962 through 1971, the State of Alabama had made some thirteen separate requests of California, seeking information as to the early release of the appellant to the State of Alabama for trial. Each of these indicated that the State of Alabama would forward the necessary extradition papers in the event that the appellant would not waive same, and such extradition would be at the

expense of the State of Alabama. Because of these circumstances, we are of the opinion that the State of Alabama secured the presence of the appellant as soon as it could because the State of California at no time had indicated that the appellant would be made available for trial in Alabama prior to releasing the appellant in 1971.[3] [4] In Ponzi v. Fessenden, 258 U.S. 254, 42 S.Ct. 309, 66 L.Ed. 607, we find:

> "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose . . . ."

Therefore, California presumably acted under the above and did exhaust its remedy before releasing appellant to the

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[3] Cf. Nelson v. George (1970), 399 U.S. 224, 90 S.Ct. 1963, 26 L.Ed. 2d 578.

[4] On each occasion that appellant appeared before the California Parole Board, according to information contained in the record, he advised the California authorities that he would not waive extradition to Alabama

State of Alabama for trial. See also, California Penal Codes Annotated, Title 12, Section 1548.1 et seq.

In discussing the commity between sovereign states, when seeking a fugitive, the Supreme Court of Illinois in People v. Klinger, 319 Ill. 275. 149 N.E. 799, 42 A. L.R. 581, stated:

> "The right of the Governor of one state to make a requisition on the Governor of another state for the delivery of a fugitive from justice, and the right of the latter Governor to grant or refuse it, are conferred by act of Congress on the ground of comity between states. If at the time such requisition is made the fugitive is in the custody of the courts of the asylum state under a charge of offense against its laws, the Governor thereof is not required to surrender such fugitive until after the judgement of the court of that state is satisfied. The executive of the asylum state may, however, relinquish the prisoner by waiving jurisdiction, even though such fugitive is under the jurisdiction of the courts of such asylum state. Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; Hart v. Mangum, 146 Ga. 497, 91 S.E. 543. The right of the Governor of the asylum state to decline to honor a demand for extradition is a right of the state, and is in nowise based on the personal right of the fugitive . . . ."

In light of these authorities, it is clear that the State of Alabama, under the facts presented by the record on appeal in this case, had no opportunity to exercise its jurisdiction over the appellant for the offense charged until his return to the State of Alabama in 1971; therefore, the trial court correctly denied appellant's motion for a speedy trial dealing with the period of incarceration in California prior to his

return to the State of Alabama.[7] [8] [9] Sellers v. State, 48 Ala. App. 178, 263 So. 2d 156.

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[7]The record indicates only one "demand" for trial in Alabama. This appeal is the first instance in which appellant has presented his constitutional claim to the Alabama Appellate Courts for consideration. See Braden v. Thirtieth Judicial Circuit of Kentucky, No. 716516, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443.

[8](a). Illustrative of Alabama's request of California is the following:
"To the Sheriff's Office, Los Angles, California, dated July 12, 1962:
"We have been informed by the FBI that subject is in your custody on a charge of Armed Robbery, and pursuant to our telegram to you today enclosed are certified copies of Indictment and Writ of Arrest by which he is charged with Robbery in this Court.
"Please enter these papers as our detainer against Prince and acknowledge them, so that we may notify the local FBI office to withdraw their fugitive warrant.

[9]See note 9 on page 375.
"Also, please let us know the status of the pending charges there and the likelihood of his being returned here. If he should become available please ascertain if he will waive extradition, and if so, notify this office and we shall promtply send our agent for him. If not, we shall obtain the necessary extradition papers.

"s/ Emmett Perry
Solicitor"

[10](b). To Superintendent of California Institution for Men, dated January 2, 1963:
"Thank you for your letter of 27 December, 1962, advising that subject is an inmate of your institution.
"There are pending here the two robbery cases indicated above. Enclosed are certified copies of our Indictments and Capiases thereon.
"Please advise the approximate release date as shown by your files, and keep us advised as to any change therein. This office will extradite at our expense.

"s/Emmett Perry
Solicitor"

[11](c). To Mr. William C. Keating, Jr., Superintendent California Medical Facility, Vacaville, California, dated November 7, 1966:
"We shall appreciate your advising us the status of our detainer against subject.
We have had no further communication from you since March

3, 1966, at which time you notified us Prince was scheduled for parole consideration in June, 1966. We replied by letter of March 10, 1966, that it is yet our intention to return him to this jurisdiction, when available, for trial upon two pending cases of Robbery.

"s/ Earl C. Morgan
District Attorney"

[12](d). To L. S. Nelson, Warden, California State Prison, San Quentin, California, dated August 19, 1970:
"This will acknowledge receipt of your notification of July 27, 1970, that the above named subject appeared on your Adult Authority calendar.
"We intend to return this defendant to this jurisdiction. In the event that he fails to sign waiver of extradition, please advise immediately and we will take necessary steps to complete extradition.

"s/ Earl C. Morgan
District Attorney"

(a). Illustrative of California's osition in this matter is as follows:
"To Emmett Perry, Solicitor, Birmingham, Alabama, dated January 23, 1963:
"Pursuant to your request of January 2, 1963, notations have been entered on our records to the effect that our above-named inmate is WANTED by your department.
"You will be given the usual sixty (60) days' notice prior to his release from the Department of Corrections.

"s/ S. J. Oberhauser
Department of Corrections
Superintendent
Chino, California"

(b). "To Emmett Perry, Solicitor, dated March 1, 1967:
"A detainer has been filed by your agency on the above man who is scheduled to appear before the Adult Authority for sentence and parole consideration on the JUNE 1967 calendar. The Adult authority can grant parole to me having detainers with the following conditions:
"A. 'Granted Parole Subject to Hold.'
This action means that, unless the agency placing the hold actually takes custody, the man will be released to a parole program without further referral to the Adult Authority.
"B. 'Granted Parole to Hold.'
This action means that, unless the agency placing the hold actually takes custody, the case must be referred back to the Adult Authority for further consideration.
"In most cases wherein detainers are on file it would be helpful

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if the Adult Authority could have some information concerning the plans of the agency placing the hold with reference to taking custody of the inmate upon a California release either by parols or discharge.

"Fully advise us regarding (1) Your intention of taking custody regardless of manner of California release i. e. parole or discharge; or (2) Your desire to arrange concurrent parole with California if California parole is granted. We will appreciate your comments.

"s/ L. J. Pope, M. D.
Acting Superintendent
California Medical Facility
Department of Corrections"

(b)(1). Alabama replied on March 8, 1967:

". . ." [I]t is yet our wish and intention to return Prince to this jurisdiction, when available, for trial upon two pending charges of Robbery.

"s/ Earl C. Moragn
DistrictAttorney"

(c). "To Earl C. Morgan, District Attorney, Birmingham, Alabama, dated February 2, 1971:

"Reference is made to the above named subject on whom your department has placed a hold.

"Be advised that subject appeared on the January 1971 Adult Authority calendar at which time he was granted a parole release date of February 22, 1971 and a discarge date of December 11, 1974. Special condition of 'Subject to Hold' was placed on the parole release.

"Please advise if your parole agents will be at this institution on Monday, February 22, 1971 to take custody, and of the approximate time of arrival.

"Your early reply will be appreciated.

"s/ L. S. Nelson
Warden"

II

[2] We note also that appellant had filed a motion for a speedy trial in the Circuit Court of Jefferson County after his return to the State of Alabama. It is sufficient to note that the State of Alabama placed the appellant's case on the trial docket immediately upon his return to this State. There were continuances granted to both appellant and the State of

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Alabama, and there were instances where appellant's case was not reached due to the crowded trial docket of the Circuit Court of Jefferson County in Birmingham until September, 1971. We hold that these continuances were properly a matter within the discretion of the trial court, and we see no abuse of discretion by the record as presented. Peaden v. State, 275 Ala. 72, 152 So.2d 136. See Volume 6A, Alabama Digest, Criminal Law, —590(1), for additional authorities.

III

[3] Appellant had filed a pretrial motion to suppress, contending that the exhibition of the photographs of the appellant to Mrs. McKinney and Mr. Potter was "impermissibly suggestive" within the meaning of Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247.

We understand the rules of *Simmons* to require that the "totality of circumstances" be considered by the reviewing court under such a contention.

Here, Detective Vance exhibited some seven or eight black and white photographs of different persons, separately, to Mrs. McKinney, and subsequently to Mr. Potter. At no time did he suggest the identity of any of them to the witnesses, nor was the appellant's name brought up in the discussion until both Mrs. McKinney and Mr. Potter each, separately, had selected the photograph of the appellant. While

it is true that a number of years went by before either of them again saw the appellant in the courtroom, each nevertheless made an in-court identification of the appellant at trial. After carefully reviewing the circumstances in the case at bar, we are of the opinion that the trial court correctly denied the appellant's motion to suppress. McGhee v. State, 48 Ala.App. 330, 264 So.2d 560.

IV

[4] The sufficiency of the State's evidence is presented for review as the appellant had both moved to exclude same and filed a motion for a new trial, which was denied. See Young v. State, 283 Ala. 676, 220 So.2d 843, and cases cited therein.

Here, the appellant's witnesses testified in effect to an "alibi" in that it was these witnesses' contention that the appellant was not physically present in the State of Alabama at the time of the occurrence of this offense, but rather was in California.

This issue was raised in Chamberlain v. State, 48 Ala.-App. 254, 263 So.2d 709, wherein this Court stated:

> "Where, as here, the appellant contends that he took no part whatever in the robbery and insists that he was not at the scene of the crime at the time of its commission, and offered testimony to support his
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> alibi, such conflict in the evidence presents a jury question. McColston v. State, 20 Ala.App. 591, 104 So. 347.
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> "We are of the opinion that the evidence here is sufficient to sustain a conviction of robbery as against a defense of alibi. McColston v. State, supra; Dorch v. State, 40 Ala.App. 475, 115 So.2d 287." See also Bimmerman v. State, 272 So.2d 914 affirmed January 30, 1973.

V

[5] Following an extensive oral charge to which the appellant announced "Satisfied," a number of written requested carges were also given. As to the remaining refused charges, we have carefully examined each and find that such were properly refused as being either affirmative in nature, incorrect statements of applicable law, argumentative under the evidence, and therefore invasive of the province of the Jury, or were fully and substantially covered in the trial court's oral charges, or other given charges. Therefore, their refusals were proper. Title 7, Section 273, Code of Alabama 1940.

We have carefully reviewed this record of Three Volumes, containing 625 pages, as required by Title 15, Section 389, Code of Alabama 1940, and find same to be free from error. The judgment of the trial court is due to be and the same is hereby

Affirmed.

ALMON and HARRIS, JJ., concur.

CATES, P. J., concurs specially., per opinions.

DeCARLO,J., recuses himself.

CATES, Presiding Judge (concurring specially).

I concur only because I believe that Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (No. 71-6516, 1973) (holding that the warden of the detaining prison is the agent of the demanding state) is apparently not retrospective. To me the necessary corollary of *Braden* is that a demanding state must, on request for a speedy trial, call on its new found agent for the body of the prisoner so that he may be prosecuted (i.e., habeas corpus ad prosequendum) presumably in a court of the state where the prisoner is detained.

In this case Alabama merely wrote letters to California. After *Braden* this is no longer enough.

Some pertient excerpts from *Braden read:*

"Read literally, the language of § 2241(a) [28 USC] requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction."

[Bracketed matter added.]

* * * * * *

"* * * The overruling of McNally v. Hill, [293 U.S. 131, 55 S.Ct. 24, 79 L. Ew. 238] *supra*, made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. * * *"

* * * * * *

"Mr. Justice Blackmun.

* * * *The present case is but one more step, with the Alabama warden now made the agent of the Commonwealth of Kentucky.*"

(Italics added.)

ON REHEARING

TYSON, Judge.

At counsel's urging, we have carefully considered this record again, and believe that the application for rehearing should be overruled. We add as additional footnotes[10] [11] to our opinion the following, and as this opinion is so extended, the application is overruled.

Opinion extended, application overruled.

CATES, P. J., and ALMON and HARRIS, JJ, concur.

DeCARLO, J., recuses self.

---

[10] From Defendant's Exhibit No. 12 to Miss Lois K. Thomas, Attorney, Berkeley, California, dated November 22, 1967, Volume I, Secord, page54:

"Alabama says that I committed two robberies there. This is untrue, and I never been convicted in Alabama for these charges. I don't what agreement has been made between the states. I never been before a judge, where any question of extradition was spoken of. And for that matter I have never signed any papers as to my agreeing upon going back to Alabama. The only times the questions of this nature were spoken to me was at my parole hearing, with the members of the parole board. At that time I made the statement that I would die before I be sent back to Alabama."

. . . . . .

"Respectfully yours"

[11] Further, from Cross Examination, Volume II, Record, page 300, the following:

"Q (BY MR. BATCHELER:) I believe when we had the recess I had asked you a question with reference to the fact that up until around February the 22nd of 1970, or around January of 1971, that up until that time that you had refused to sign to 'go to hold' is that correct?

"A That's correct, sir.

"Q Then, somewhere close to February the 22nd, or 23rd, or 24th, or 25th, along about that time, you did sign saying that you would come to Alabama 'subject to hold,' is that correct?

"A&Yes, sir, that's correct. That was the only time I had a parole to come here, and I signed it. The other time it was—The parole system was different to go to hold than it is to 'come to hold . . . .'"

BEST COPY AVAILABLE

APPENDIX "E"

28 UNITED STATES CODE 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the

State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to prepresent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is sthown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

BEST COPY AVAILABLE

APPENDIX "F"

The following are portions of the evidence which was introduced at the State Court hearing and submitted in support of the State's return in *Prince v. Bailey* (N.D. Ala., 71-1003). Pursuant to the order to show cause (R. p. 10), these Exhibits were resubmitted by the State in this case.

This evidence was submitted to the District Court as three exhibits: Exhibit "A," being the transcript at the State Court hearing; Exhibit "B," being the collected State's Exhibits from the State Court hearing; Exhibit "C," being the collected Defense exhibits from the State Court hearing.

I
FROM EXHIBIT B
STATE'S EXHIBIT 46

State's exhibit 46 was a detailed statement sent to the District Attorney of Jefferson County, Alabama, by the Respondent in 1963. The purpose of the statement was to obtain dismissal of one of the robbery charges then pending against the Petitioner. The bulk of this statement is not particularly relevant to these proceedings. However, the statement ends with a passage that demonstrates the circumstances under which the Respondent left Alabama. The statement ends thusly:

> ". . . After knocking him out and leaving him a bloodie mess I went home and started packing my clothing. After leaving my home I hid out in Birmingham for several weeks. I heard the police were looking for me for the crime of robbery and questioning on the same (robbing Hog and his partner), because of this, I took off and went out here to California. . . ."

II
FROM EXHIBIT "C"
DEFENDANT'S EXHIBIT 12

Name Thomas R. Prince
Box No. A-75627
Date November 22, 1967

Miss Lois K. Thomas
Attorney At Law
185 - The Uplands
Berkeley, California #94705
Dear Miss Thomas:

Thank you tremendously for your letter of October 14, 1967.

While I regret very much to say, that I want you and not your acquaintance to assist me in these matters. You are a wonderful lawyer and I respect your ability in the field of criminal and civil law, and I feel that you are qualified to handle my case.

I was convicted, October, 1962 in California for charges of robbery and grand thef. The State of Alabama is not trying to get me now, but they are trying to get me sent back there after I've finished my prison sentence here in California.

Alabama says that I committed two robberies there. This is untrue, And I never been convicted in Alabama for these charges. I don't what agreement has been made between the states. I never been before a judge, where any question of extradition was open of. And for that matter I have never signed any papers as to my agreeing upon going back to Alabama. The only times the questions of this nature were spoken to me was at my parole hearing, with the members of the parole board. At that time I made the statement that I would die before I be sent back to Alabama.

I am a 29 year old "black man" and charges were filed against me long before I got in this trouble out here in California.

2

Name _____
Box No. _____
Date _____ 19—

The charges against me in Alabama are Robbery 2 counts the grand jury nos. 48874 and 48875. Mr. Earl C. Morgan, District Attorney 610 - Court House, Birmingham 4, Alabama, Zip code number 35203.

Because of these detainers against me, under the California penal code sec. 1389; sec. 800. filing of indictment, — 802, and 1050 commencement. And also under the 6 Amendment under these laws I am entitled to a speedy and fair trial. And the State of California didnt have the right by law to sentence me before Alabama did.

Alabama was supposed to sentence me and then turn me back over to the state of California to be sentenced. I should be doing a sentence for Alabama if I have been convicted there with a hold from California.

Alabama had original jurisdiction. Under these laws I have been in prison more than 5 years, in Calif. Therefore I believe Alabama has lost jurisdiction to try me or convict me. I would like very much to know what you think.

I hope you are in position to take my case. I am young and dont wish to spend the rest of my life in prison. I go back to the board in may of 1968 and the board members have promised me a parole if I bring them clean time and dont get into any trouble.

So I know you will understand just how I feel about getting these charges dropped. I want to be free to love and live like a man should.

3

Name _____
Box No. _____
Date _____ 19—

Alabama placed these detainers against me may of 1962, and I was sentenced to prison in California, Oct. 1962. Since that time I have written letters to Alabama in which I have copies dated October 28, 1963, May 9, 1964, December 2, 1965, December 7, 1966 and March 8, 1967, all of them asking Alabama to drop the charges they have against me. And I have letters *from* Alabama in regards to the same.

As I have information as to your ingenuity in reference to your ability at law, I feel that my case would be in the best hands available to anyone in a position such as I.

As I am financially embarrased at this particular time I find it necessary to appeal to your appitite for justice, in relation to taking my case until such as I can pay you in full, for your services.

On the other hand I possibly can raise a retainer fee if and when you forward to me the nessisary information concerning amount, and the possibilities of getting the hold droped.

Anxously and hopefully I remain

Respectfully yours

III

FROM EXHIBIT "C"

DEFENDANT'S EXHIBIT 48

SUMMARY OF SENTENCE DATA

	Credits Forfeited	Restored Credits	Additional Credits	Discharge Date	Parole Effective Date
CRIME:	Robb 1st w/3 PFC & GT. CC				
	211 & 487.1 PC				
TERM:	5-life & 6 mo-10, CC				
COUNTY:	Los Angeles				
County Case No.:	260920 & 261575				
JUDGE:	H. V. Walker				
12-11-62	Rec'd by RGC Chino				

1-28-63	DA — 10th Judicial Circuit Circuit Solicitor, Birmingham, Alabama		
2-5-63	Recd CMf		
6-4-64	Denied FPC PP to app 1 yr Cal (June)		
5-18-65 (June)	Denied PP to app 1 yr Cal (Apr)		
4-07-66	DENIED Place on 6/67 MR Cal		
5-10-67	DENIED PLACE ON 6-68 MR ADULT AUTHORITY CAL		
6-12-67	Rec'd SQ		
6-27-68	Denied Pl. on MMM Cal.		
6-24-69	Denied Pl. on MR Cal.		
6-25-70	Subm for Res. PR Pl. on 7-70 MM Cal		
7-23-70	TFA 12 yrs & 10 yrs CC. GTd		eff.
	par off. 12-14-70 To go to Hold	12-11-74	12-14-70

EXHIBIT D

Summary of Sentence Date PRINCE, Thomas R. A 75627
WANTED

IV

FROM EXHIBIT "A"

FROM THE RESPONDENT'S TESTIMONY

ON CROSS-EXAMINATION

The Respondent was cross-examined as to why he withdrew a waiver of extradition after he had been granted a parole to Alabama for trial conditioned on such waiver. The Respondent testified as follows:

> "THE WITNESS: This was signed before I had my parole board hearing. Everyone goes to the board has this same type of thing, if he has got anything against him at all, and I would not accept a parole from the Board, because that was supposed to be my out-date, December the 14th, 1970, and why I wouldn't accept it, is because giving a man this type of parole is unconstitutional in the state of Califor-

nia, and they was still using it. This was the reason for my filing the application in the Federal Court about the Board and this is why I went back to the Board and got change of condition, because when you are paroled subject to hold you are coming to the place of trial, and if you beat the charges against you you are free, other than being on parole from the state, but if I come here to come to hold, when I come here, whatever happens here, I go back into the bloody walls of San Quentin [Prison, California]."

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this ——— day of May, 1975, I did serve the requisite number of copies of the foregoing Petition for a Writ of Certiorari and Appendicies on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

Honorable Robert R. Bryan
Attorney at Law
819 Frank Nelson Building
Birmingham, Alabama 35203

Honorable Robert R. Bryan
Attorney at Law
331 Frank Nelson Building
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
Assistant Attorney General
Assistant Attorney General
State of Alabama

Address of Counsel:

Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104

Supreme Court, U. S.
FILED
JUL 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1426

STATE OF ALABAMA,

Petitioner

VERSUS

THOMAS R. PRINCE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Montgomery, Alabama 36104

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Respondent's opposition brief indicates little disagreement between the parties on the facts. The conflict between the petition and the Respondent's brief is primarily one of emphasis. The Petitioner-State emphasizes the facts that the Respondent himself occasioned the delay by fleeing the State and continued it by refusing to waive extradition to Alabama for trial. that Alabama had made diligent efforts to determine the Respondent's availability for extradition and trial and that Alabama had extradicted the Respondent as soon as California indicated that he was available. The Respondent on the other hand emphasizes his efforts to have the charges dismissed and that the delay was for over eight years. In this brief the

State of Alabama will address the length of the delay and the question of the prejudice which allegedly resulted therefrom.

A

THE LENGTH OF THE DELAY

The Respondent argues that the delay of over eight years denied him a speedy trial. Such heavy emphasis is placed on the length of the delay that the Respondent seems to be saying that the other aspects of the case are of little if any relevance. The Respondent refers to his assertions of his right to a speedy trial and to the prejudice which allegedly resulted from the delay. However, the assertion of a right can hardly be considered effective if it is simultaneously coupled with obstruction of the right. As Judge Tyson noted in the Respondent's State Court appeal: "Clearly, the appellant [the Respondent here] could not both demand trial in Alabama on the one hand, and refuse to appear on the other." *Prince v. State* [Note 4] 50 Ala. App. 368, 371, Appendix "D" to the petition, p. 87. Similarly, the alleged prejudice resulting from the delay was, as will be discussed below, speculative at best. The Respondent places heavy reliance on the length of the delay apparently because there is little else in his favor.

At the outset, it must be candidly noted that if a state solely through malice or negligence failed for eight years to try an indictee, who was ready, willing and able to be tried, there could be little doubt that a denial of speedy trial would result. However, this case does not present a delay resulting from malice or negligence on the part of the State of Alabama, and the Respondent was neither ready nor willing nor able to be tried until the time he was in fact tried.

The length of the delay in this case, on which the Respondent places so much reliance, was nearly identical to the length of the delay in *Smith v. Hooey*, (393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 [1969])[1] This Honorable Court ruled that Smith had the right to a speedy trial but did not suggest that the right had been denied at that point. In 1972 this Honorable Court examined a delay of over five (5) years in *Barker v. Wingo* (407 U. S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) and found no denial of speedy trial.

However, in *Barker v. Wingo* this Honorable Court did considerably more than recognize that the right to a speedy trial could, under some circumstances, tolerate considerable delay. In *Barker* this Honorable Court endeavored to establish the dimensions of the right to a speedy trial. Before attempting to set standards for what constitutes a denial of a speedy trial, this Honorable Court noted several differences between the right to a speedy trial and other Constitutional Rights: First, it was noted that unlike most Constitutional Rights, the society has a direct interest in speedy trial. Second, it was observed that delays of trial often work to the advantage of the accused and to the disadvantage of the prosecution; and third, that the right to a speedy trial cannot be rigidly defined.

This Honorable Court held in *Barker* that the test of the denial of the right to a speedy trial was a flexible balancing test based on all relevant factors, generally summarized as follows: The length of the delay, the reasons for the delay, the accused's actions asserting his right, and the prejudice to the accused. The delay in this case was certainly long enough to raise a possibility of a denial of speedy trial. But, *Barker*

---

[1] Smith was indicted some time in May, 1960; this Honorable Court's decision was rendered January 20, 1969.

holds that delay alone is not enough. The reason for the delay in his case was that the Respondent was lawfully imprisoned in another State a continent away from Alabama and was unavailable for extradition. The Respondent claims that he, by various motions asserted his right to a speedy trial, but at the same time he was refusing to do the one thing which would have gotten him a trial—a waiver of extradition to Alabama for trial. This leaves the question of prejudice discussed in the next section.

B

THE ALLEGED PREJUDICE

In dealing with the question prejudice the Respondent claims four different instances of prejudice allegedly occasioned by the delay. Of these, two relate to the trial and two relate to the effects of the Alabama detainer on the Respondent's California imprisonment.

The Respondent claims that the delay denied him of three necessary witnesses. One of these was the late Dr. Martin Luther King. It has never been clear how these witnesses relate to the case nor is there any indication of what evidence they might have had. The only thing sure about them is that they were all dead by the time the Respondent agreed to return to Alabama to answer the charges.

The Respondent claims that the delay caused memories to fade. And, indeed several of the State's witnesses evidenced a lack of certainty and this undoubtedly weakened the State's case. However, it is difficult to see how the Respondent can claim prejudice as a result of the damage done to the State's

case by the delay which he caused.[2]

Finally, it is difficult to see how the State of Alabama can be charged with any difficulties suffered by the Respondent while he was incarcerated in California and was resisting extradition to Alabama.

The Respondent suggests that with such a long delay, prejudice should be presumed as a matter of law. This appears to fly in the face of *Barker v. Wingo* (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) which is later than any of the cases cited by the Respondent. It also flies in the face of common sense in a case such as this one, wherein the accused caused and continued the delay.

C

THE RESPONDENT DID NOT WANT A SPEEDY TRIAL

Mr. Justice Powell concludes the unanimous opinion of this Honorable Court in *Barker v. Wingo* (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) with these words which are extremely relevant in this case:

> ". . . [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indi-

[2] In **Barker v. Wingo,** Mr. Justice Powell observed:
". . . A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. . . ."
407 U.S. 514, 521, 33 L. Ed. 2d 101, 111.

cates, as does this one, that the defendant did not want a speedy trial. . . ." 407 U.S. 514, 536, 33 L. Ed. 2d 101, 120.

Such is the record in this case. The record shows the Respondent doing all manner of things to avoid trial and to obtain dismissal of the charges: fleeing the jurisdiction, writing letters, filing motions, writs, etc., refusing to waive extradition. He demanded a speedy trial only after 1967. The reason for this is suggested by his November 22, 1967, letter to his attorney wherein he writes, "Therefore, I believe Alabama has lost jurisdiction to try or convict me." Appendix "F," II. to the Petition, p. 111. In other words, the Respondent sought a speedy trial only after he thought that it was too late to give him one and that the charges were due to be dismissed. Even then he refused to waive extradition until 1970.

The basic policy question presented by this case is whether the right to a speedy trial, a means of obtaining justice for the accused and society, may be perverted into a means of defeating justice.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, points out that the opposition brief does not deny that the decision of which the Petitioner seeks review conflicts with the prior decisions of this Honorable Court and presents important questions which have not been but ought to be ruled on by this Honorable Court, as claimed in the petition. And, the State of Alabama again prays that the writ be issued.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

JOSEPH G. L. MARSTON, III
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this ____ day of July, 1975, I did serve the requisite number of copies of the foregoing Reply Memorandum on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

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2101 Second Avenue North
Birmingham, Alabama 35203

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Supreme Court, U. S.
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OCT 14 1975

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OCTOBER TERM, 1974

NO. 74-1426

STATE OF ALABAMA,
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VS.

THOMAS R. PRINCE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S PETITION FOR REHEARING

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S PETITION FOR REHEARING

The Petitioner respectfully requests rehearing of the denial of the writ of certiorari on October 6, 1975, in accordance with Rule 33(1) of this Honorable Court on the grounds of intervening circumstances of substantial or controlling effect as follows:

1. One of basic controlling issues presented by the petition is the question of whether or not an accused person may delay his trial by exercising other legal rights, e.g. resisting extradition, and then claim the resulting delay as a denial of speedy trial.

2. In the case presented by the petition the United States Court of Appeals for the Fifth Circuit held by necessary implication that the delay resulting from the Respon-

dent's assertion of his legal right to resist trial in Alabama could and did result in the denial to him of a speedy trial.

3. Subsequent to the filing of the petition, i.e. on August 8, 1975, the same United States Court of Appeals held in *Braden v. Capps,* (5th Cir., 1975) 517 F. 2d 221, that the delay occasioned by an accused person's asserting various legal rights did not constitute a denial of speedy trial. A copy of this case is submitted as an appendix to this petition.

4. In light of the Fifth Circuit's holding in *Braden v. Capps,* supra, it is evident that there has been a change in the position of the Fifth Circuit on this issue subsequent to its holding in this case and the filing of the petition.

CONCLUSION

For the foregoing reasons the Petitioner respectfully prays that rehearing of the denial of the writ be granted and that a writ of certiorari be issued and that under that writ this Honorable Court proceed to either review the decision of the United States Court of Appeals for the Fifth Circuit or, in the alternative, to remand the case back to that Court for further consideration in light of *Braden v. Capps,* (5th Cir., 1975) 517 F. 2d 221.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
COUNSEL FOR PETITIONER

CERTIFICATE OF COUNSEL.

I, Joseph G. L. Marston, III, counsel for the above-named Petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
COUNSEL FOR PETITIONER

APPENDIX

NORMAN LORENZO BRADEN,
PETITIONER-APPELLANT,
V.
WALTER T. CAPPS, WARDEN, AND STATE
OF ALABAMA, RESPONDENTS-APPELLEES
NO. 74-3190.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
AUG. 8, 1975.

A state prisoner sought habeas corpus relief on the ground of denial of Sixth Amendment right to speedy trial. Relief was denied by the United States District Court for the Southern District of Alabama, at Mobile, Virgil Pittman, Chief Judge, and the prisoner appealed. The Court of Appeals, Godbold, Circuit Judge, held that in view of the fact that defendent had sought to prevent judicial machinery from moving to the trial stage and in view of want of prejudice from delay, defendent was not denied a speedy trial though there was a delay of three years between indictment and trial.

Affirmed.

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In view of fact that defendant had sought to prevent judicial machinery from moving to trial stage and in view of want or prejudice from delay, defendant was not denied constitutional right of speedy trial though there was delay of three years between indictment and trial. U.S.C.A.Const. Amend. 6.

William L. Howell, (Court-appointed), Mobile, Ala., for petitioner-appellant.

William J. Baxley, Atty. Gen., Sarah M. Greenham, Asst. Atty. Gen., Montgomery, Ala., Herbert H. Henry, Asst. Atty. Gen., Birmingham, Ala, Willis Holloway, Asst. Dist. Atty., Mobile, Ala., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant Braden, an Alabama state prisoner, was denied a writ of habeas corpus by the District Court. The primary ground of his petition was alleged denial of the Sixth Amendment right to speedy trial.

Braden was indicted at the same time on the case here involved (Burglary A) and two apparently related cases (Burglary B, and an assault with intent to murder charge which appears to have occurred in connection with Burglary B). All occurred in the same neighborhood and on the same night.

The chronology of events in the three cases is long and convoluted, and it would serve no useful purpose to restate it in full. The District Court carefully weighed the factors outlined in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). It found that the delay of three years between indictment and trial was sufficient to require serious consideration of Braden's claim, and that Braden had properly asserted the right to a speedy trial. Analyzing the various delays making up the three years, the habeas judge concluded that in two respects they were self-imposed by Braden. First, he found that continuance of all three cases by orders entered February 13, 1969, triggered a period of delay that was chargeable to Braden. The continuance involved a complex of events including the state's election to proceed first with trial of Burglary B, Braden's desire to try the assault case first, a one-day delay (from February 12 to February 13) granted in an effort to protect Braden's

interest, and, on February 13, a motion by Braden to further continue Burglary B, and orders by the court to continue all three cases. Braden's witnesses were subpoenaed in the three cases and were present both February 12 and 13.

We are not able to say that the habeas judge — familiar with state trial practice from many years as a state trial judge — erred in concluding that the delay in the trial of this case, Burglary A, resulting from the events of February 12-13, was caused by Braden.[1]

The second delay found to be self-imposed arose in October 1970. Burglary B had been tried, and, after numerous intervening events, the instant case was set for trial on October 15. The trial court had denied motions calling for dismissal of the indictments for failure to have a speedy trial, and Braden had filed in the Alabama Court of Criminal Appeals a petition for a writ of mandamus challenging the right of the state to try him at all and contending that the indictments must be dismissed for failure to grant a speedy trial. Braden wrote the clerk of the trial court on October 3 suggesting that the court might not wish to proceed with trial since mandamus had been denied by the Court of Criminal Appeals and certiorari had been granted by the Supreme Court of Alabama. Braden stated that it might take many months for that court to adjudicate the matter, therefore,

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[1] Additional facts undergird what seems to us implicit in the habeas judge's opinion, that on February 12-13 Braden was not seeking trial on any case but seeking to avoid trial on all three cases. At arraignment Braden had sought additional time to secure counsel. Later he had been offered, and had refused, appointed counsel. On February 12-13 he appeared pro se. Some weeks after the February 13 continuances were entered he asked that counsel be appointed, which was done.

Also, on February 13 Braden filed in all three cases a request that the cases be sent back to an inferior court for another preliminary hearing, a petition for a writ of habeas corpus, and a motion requesting that he be furnished with pretrial records and law books. All were denied.

he requested he be sent back to the state prison as soon as possible.[2] The trial court continued the case "pending the outcome of defendant's petition in the Supreme Court [of Alabama]."

The habeas court did not err in considering that this action was an appropriate response to Braden's letter and that the resulting time while the mandamus case made its way through the state courts was the responsibility of Braden. (After the Supreme Court of Alabama denied the petition to it for a writ of certiorari Braden sought certiorari from the Supreme Court of the United States. He unequivocally asked the trial court for a delay of trial while this petition was pending. The request was granted.)

Trial of Burglary A finally was held in June 1971, promptly after the United States Supreme Court denied certiorari. On direct appeal Braden raised the speedy trial issue. The Court of Criminal Appeals considered the question at length and held there had been no denial, pointing to the principal relating to self-imposed delay.

In analyzing the "reason for delay" factor discussed in *Barker v. Wingo*, the courts have often not permitted the accused to complain of self-caused delay.[3] The particular point before us is laid to rest by the decision of this circuit in *Torres v. Florida*, 477 F.2d 555 (CA5, 1973), holding that an accused may not complain of the delay in his trial caused by his seeking a mandatory writ in an effort to prevent his

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[2] Actually the Court of Criminal Appeals had denied mandamus and denied a petition for rehearing, and a petition for a writ of certiorari had been filed in the Supreme Court of Alabama, but that court had not acted on it. Certiorari was denied November 19, 1970, approximately one month after the trial setting. Braden then applied to the United States Supreme Court for writ of certiorari, and that was denied April 5, 1971.

[3] Although deeper analysis is required than that the accused in a casual sense triggered a procedure or event that consumed some period of time. See footnote 5, **infra**.

trial. For similar situations, see the following cases treating the particular type of delay described as chargeable to the accused: *United States v. Cook*, 463 F.2d 123 (CA5) 1972) (delay caused by appeals attacking conditions imposed on defendant's appearance bonds); *United States v. Albright*, 388 F.2d 719 (CA4, 1967) (trial adjournment to give mental examination to defendant, necessitated by his raising at trial and for the first time a defense of insanity at the time of the offense); *United States v. Singleton*, 460 F.2d 1148 (CA2, 1972) (delay caused by defendant's offer to cooperate with government with aim of getting charges dropped, defendant's help was unsatisfactory); *United States v. Key*, 458 F.2d 1189 (CA10), *cert. denied*, 408 U.S. 927, 92 S.Ct. 2510, 33 L.Ed.2d 339 (1972), and *United States v. Leal*, 460 F.2d 385 (CA9, 1972) (delay caused by defendant's effort to have case transferred to another jurisdiction); *United States v. Robinson*, 145 U.S.App. D.C. 46, 447 F.2d 1215 (1971) (postponement of trial caused by defendant's refusal to stipulate to the testimony of an ill prosecution witness although his counsel was willing to stipulate.)[4] Braden cannot have his cake and eat it too — i.e., seek to prevent the judicial machinery from moving to the trial stage, ask for time for that purpose, but reserve the right to complain later of the resulting delay.[5] To permit an accused to frustrate trial but later seek advantage from the delay he has

[4] In Prince v. Alabama, 507 F.2d 693 (CA5, 1975), we implicitly accepted that the defendant would not be able to claim the benefit of delay in his extradition to the state seeking to try him if he had acted to frustrate extradition. We found, however, that he had not sought to frustrate extradition.

[5] This is to be distinguished from what might be termed "neutral" passage of time, such as time required for hearing a nonfrivolous and timely-filed motion to suppress, or timely and reasonable avail to discover procedures. Compare United States v. Drummond, 488 F.2d 972 (CA5, 1974), holding the defendant chargeable for time caused by dilatoriness in discovery.

triggered runs counter to the public interest in speedy trials which the courts have begun to recognize.

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.

Barker v. Wingo, *supra*, 407 U.S. at 519, 92 S.Ct. at 2186, 33 L.Ed.2d at 110-111. The opinion in *Barker* points to various consequences of trial delay that offend societal interests: backlogs of cases which enable defendants to more effectively negotiate for pleas of guilty to lesser offenses and otherwise manipulate the system; commission of other crimes, and the temptation of jumping bail, when the defendant is free for an extended period awaiting trial; overcrowding of prisons; the dollar cost of maintaining prisoners in detention; the burden on society of supporting the families of incarcerated breadwinners. 407 U.S. at 519-520, 92 S.Ct. at 2186-2187, 33 L.Ed.2d at 110-111.

> It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges.

Strunk v. United States, 412 U.S. 434, 439 n. 2, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56, 61 n. 2 (1973).

We agree with the court's findings concerning lack of prejudice. Braden claims that he lost the opportunity to

produce an alleged alibi witness whose identity is unverified and whose present whereabouts are unknown. The first two times the present case was set, February 12, 1969, and an earlier setting, the alleged witness was not included in the list of witnesses that Braden requested be subpoenaed.

When the findings that we have discussed are considered under the balancing process required by *Barker v. Wingo*, the decision of the District Court was not erroneous.

The judgment denying the writ is affirmed.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this _____ day of October, 1975, I did serve the requisite number of copies of the foregoing Petition for Rehearing and Appendix on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

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